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THE

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RESTRICTIVE COVENANTS: PURCHASERS' RIGHT TO ENFORCE *INTER SE*.

THE right of purchasers from a common vendor to enforce *inter se* restrictive covenants made with their vendor is a development of, or rather a collateral out-growth from, the doctrine commonly but not very accurately called the doctrine of covenants running with the land. In writing of this doctrine in 1829, Mr. Platt says (*a*), "Perhaps no branch of the law of covenants is less understood," and he then proceeds to fully and clearly set out the then existing law in regard to such covenants. After the efforts of Mr. Platt, and in view of the numerous decisions that have since his time been given upon this branch of the law, it would perhaps be scarcely justifiable to now repeat Mr. Platt's remark; but of that particular branch of the doctrine with which this article is more particularly concerned, which is a matter almost altogether of modern judicial development and of growing importance, it may not be amiss to briefly consider the limits.

"On all questions concerning covenants running with the land we resort to the resolutions in *Spencer's Case*, 5 Rep. 16a as the ultimate authority (*b*)," and in that case and in the notes to it in Smith's Leading Cases (*c*), will be found nearly all the law on the question of covenants running with the land. It is unnecessary to try to restate

(*a*) Platt on Covenants, p. 460.
(*b*) *Per* Patterson, J.A., in *Emmett* v. *Quinn*, 7 A. R. 306 at p. 329.
(*c*) 9th ed. vol. I. p. 65.

what is there and in many other places (*d*) fully set forth as to the nature of the covenants that run or do not run with the land; the distinctions between the burden running and the benefit running; the peculiar position in this respect of lessor and lessee, and the various other interesting questions that from time to time arise in practically applying the doctrine. In our own Courts too may be found many decisions throwing light upon questions of this kind, for instance as to covenants to repair (*e*); covenants not to assign without leave (*f*); to pay off incumbrances (*g*); for title or against incumbrances (*h*); to pay for improvements or buildings (*j*); to insure (*k*); to insure and rebuild (*l*); to pay for party walls (*m*); to release parcels upon payment of the mortgage money (*n*); and as to the person who is entitled to the remedy and the person against whom the remedy may be sought where there have been assignments before or after the breach complained of (*o*). But it is unnecessary to consider these cases particularly.

The doctrine with which we are now more immediately concerned does not depend upon the curious learning which

(*d*) See for example Dart V. & P. 6th ed. p. 862; Sugden, V. & P. 14th ed., p. 576; Woodfall on Landlord and Tenant, 13th ed. p. 162; Emden on Building and Building Agreements, 2nd ed. chaps. 20, 21 and 22; Rawle on Covenants, 4th ed. p. 313; 31 Sol. J. 212, 229, 265, 281 and 298; 20 Am. L. Rev. 389.

(*e*) *Emmett* v. *Quinn*, 7 A. R. 306; *Thistle* v. *The Union Forwarding Company*, 29 C. P. 76; *Crawford* v. *Bugg*, 12 O. R. 8.

(*f*) *Lee* v. *Lorsch*, 37 U. C. R. 262; *Crawford* v. *Bugg*, 12 O. R. 8.

(*g*) *Clark* v. *Bogart*, 27 Gr. 450.

(*h*) *Gamble* v. *Rees*, 6 U. C. R. 396; *Scott* v. *Fralick*, 6 U. C. R. 511; *Claxton* v. *Gilbert*, 24 C. P. 500; *Burrowes* v. *DeBlaquiere*, 34 U. C. R. 498; *Meredith* v. *McCutcheon*, 13 C. P. 209; *Empire Gold Mining Company* v. *Jones*, 19 C. P. 245; *Campbell* v. *Burley*, 19 U. C. R. 204, where a purchaser at a sheriff's sale was held entitled to the benefit of such covenants; *Keyes* v. *O'Brien*, 20 U. C. R. 12, where it was held that the purchaser of part of the land in question may have the benefit of the covenant.

(*j*) *Berrie* v. *Woods*, 12 O. R. 693; *McClary* v. *Jackson*, 13 O. R. 310; *Hilliard* v. *Beck*, 9 C. L. T. Occ. N. 90; *Ambrose* v. *Fraser*, 12 O. R. 459; 14 O. R. 551.

(*k*) *Douglass* v. *Murphy*, 16 U. C. R. 113.

(*l*) *McGill* v. *Proudfoot*, 4 U. C. R. 33.

(*m*) *Kenny* v. *McKenzie*, 12 A. R. 346.

(*n*) *Clarke* v. *The Freehold L. & S. Co.*, 16 O. R. 598.

(*o*) *Rowe* v. *Street*, 8 C. P. 217; *Scriver* v. *Myers*, 9 C. P. 255; *Cuthbert* v. *Street*, 9 C. P. 386; *Harry* v. *Anderson*, 13 C. P. 476.

may be found in these books and cases, upon the strictly legal question of how far assigns may be bound by or take the benefit of covenants entered into by their predecessors in title, but upon the equitable doctrine, ingrafted on the legal one, that, whether a covenant does or does not bind an assign in law, still a Court of Equity will not allow an assign, taking property with notice that it is subject to the observance of certain stipulations, to use the property in such a manner as to violate these stipulations. This doctrine is of comparatively modern growth and indeed has only within a very few years had its limits defined.

Keppell v. *Bayley* (*p*) is one of the earliest cases in which this doctrine was invoked though in that instance unsuccessfully. This was a case where the purchaser of certain land covenanted to take stone from a certain quarry and to ship that stone by a certain line of railway at a certain rate. It was contended that an assign of this purchaser was bound by this covenant at law, but if not, that he was at all events bound in equity, having taken with notice of the covenant. It was held, however, that the covenant did not run at law, and it was also expressly laid down that where a covenant does not run at law it will not be given a more extensive application in equity by holding the conscience of the purchaser bound. The latter proposition in this broad form has long since been overruled, though even under the later authorities the decision come to is perfectly right.

The well-known case of *Tulk* v. *Moxhay* (*q*) placed the doctrine on a more satisfactory footing. There the plaintiff, the owner of a vacant piece of land and the houses surrounding it, sold the vacant piece of land, the purchaser covenanting for himself, his heirs and assigns, with the vendor, his heirs and assigns, to keep the vacant land as a square and pleasure ground uncovered by any buildings. The defendant, who took the land with notice of this covenant, was restrained from building upon it, the principle being, as Lord Chancellor Cottenham said, that a party

(*p*) 2 My. & K. 517.
(*q*) 2 Ph. 774; 11 Beav. 571.

was not to be permitted to use land in a manner inconsistent with the contract entered into by his vendor with notice of which he purchased. A similar decision was come to in *DeMattos* v. *Gibson* (*r*), where it is laid down that where property, either immoveable or moveable, is disposed of with notice of a prior contract, entered into by the person disposing of it, for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise.

The extent, however, to which this equitable doctrine could be carried was not until very lately exactly defined. In *Cox* v. *Bishop* (*s*), and *Moore* v. *Greg* (*t*), it was held that a mere equitable assignee was not liable on the positive covenants of the person under whom he took, but in *Cook* v. *Chilcott* (*u*) it was held that, where a purchaser took land upon which there was a spring and covenanted to erect a pump and supply water to all houses that might be built on certain adjoining land of the vendor, this covenant might be enforced in equity against a sub-purchaser with notice. In *Haywood* v. *The Brunswick Permanent Building Society* (*v*), this case was in effect overruled, and *Cox* v. *Bishop* was approved, it being laid down that the doctrine of *Tulk* v. *Moxhay* should not be extended, and that the only covenants that could be enforced in equity, where they could not be enforced at law, were restrictive covenants, or in some cases covenants that could be enforced against the land itself. The covenant there in question was a covenant by a purchaser for himself, his heirs, executors, administrators and assigns, to pay a certain rent and to erect and keep in good repair, and when necessary to rebuild, messuages on the land of the value of double this rent, and it was held that this covenant could not be enforced against assigns of the purchaser.

(*r*) 4 DeG. & J. 276.
(*s*) 8 D. M. & G. 815.
(*t*) 2 Ph. 717.
(*u*) 3 Ch. D. 694.
(*v*) 8 Q. B. D. 403.

The question was further considered in *London & South Western R. W. Co.* v. *Gomm* (*w*), and *Austerberry* v. *The Corporation of Oldham* (*x*). In the latter case there was a covenant by the purchaser of a certain strip of land, bounded on both sides by lands retained by the grantor, to make a road of this strip and to keep it in repair. It was held that the benefit of this covenant did not run at law with the land of the grantor because it did not relate to or touch that land, and was not a covenant to do anything on that land, and it was distinctly laid down that the only covenants not running at law that can be enforced in equity as against assigns with notice are restrictive covenants, and not positive covenants or covenants that cannot be performed without expenditure of money (*y*).

Upon this equitable doctrine then, of enforcing restrictive covenants against a purchaser who takes with notice of them, is founded the right of purchasers from a common vendor to enforce *inter se* the observance of such covenants; but to give that right something more is necessary than to merely prove that the person whose actions are sought to be restrained has taken with notice of the restriction; there must be something in addition entitling the person complaining to claim the benefit of the restriction.

It is not until we come to very recent cases that we find any attempt to lay down general rules upon this question. The earlier cases are decided upon the special circumstances therein found, and are useful only in so far as they have to be looked to as justifying the principles laid down in the more recent authorities. They are too numerous to refer to in detail, and may perhaps be roughly classified as follows: cases where the covenant sought to be enforced has been entered into by the original purchaser, not simply with his vendor, but also either directly or indirectly with

(*w*) 20 Ch. D. 562.

(*x*) 29 Ch. D. 750.

(*y*) And see *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Catt* v. *Tourle*, L. R. 4 Ch. 654; *Luker* v. *Dennis*, 7 Ch. D. 227; *Feilden* v. *Slater*, L. R. 7 Eq. 523; *Morland* v. *Cook*, L. R. 6 Eq. 252; *Clements* v. *Welles*, L. R. 1 Eq. 200; *Hall* v. *Ewin*, 37 Ch. D. 74; *Keates* v. *Lyon*, L. R. 4 Ch. 218; *Vankoughnet* v. *Denison*, 1 O. R. 349; 11 A. R. 699.

those who are or may subsequently be co-purchasers (*z*); cases where the vendor himself covenants to observe or impose certain restrictions, and there is the implied right in each purchaser to enforce their observance (*a*); cases where there is a general "building scheme" for the benefit of all persons purchasing part of the estate, and each has the right to enforce the due observance of the scheme (*b*).

It is in *Renals* v. *Cowlishaw* (*c*), that we first find a satisfactory summing up of the principles which govern cases of this kind. In that case the owners of a manor house and residential property connected therewith and of certain pieces of adjoining land sold two of these pieces, the purchaser covenanting for himself, his heirs, executors and administrators, with the vendors, their heirs, executors, administrators and assigns, not to build on the land except in a certain specified manner, and not to carry on upon the land any trade or business. It was not stated that this covenant was for the protection of the residential property or the other adjoining pieces of land. About the same time other pieces of the adjoining land were sold and similar covenants were exacted from the purchasers of these pieces. Subsequently the manor house and residential property were sold to the predecessor in title of the plaintiffs, but without covenants of this kind. The plaintiffs, however, covenanted with their vendor not to build a public house upon or carry on offensive trades upon a particular portion of the property conveyed to them, but there was no reference in the conveyance to the sales of the adjoining pieces of land or to the restrictive covenants entered into by the purchasers thereof, and there was no representation

(*z*) *Whatman* v. *Gibson*, 9 Sim. 196; *Piggott* v. *Stratton*, 1 DeG. F. & J. 33; *Harrison* v. *Good*, L. R. 11 Eq. 338. And see *Tod-Heatley* v. *Benham*, 40 Ch. D. 80.

(*a*) *Mann* v. *Stephens*, 15 Sim. 377; *Child* v. *Douglas*, Kay 560; 5 D. M. & G. 739; 2 Jur. N. S. 950; *Patching* v. *Dubbins*, Kay 1; *Jay* v. *Richardson*, 31 L. J. Ch. 398; *McLean* v. *McKay*, L. R. 5 P. C. 327; *Master* v. *Hansard*, 4 Ch. D. 718. And see *Groves* v. *Loomes*, 34 W. R. 94; 53 L. T. 592; 55 L. J. Ch. 52.

(*b*) *Schreiber* v. *Creed*, 10 Sim. 9; *Coles* v. *Sims*, Kay 56; 5 D. M. & G. 1; *Western* v. *Macdermott*, L. R. 1 Eq. 499; L. R. 2 Ch. 72; *Lord Manners* v. *Johnson*, 1 Ch. D. 673.

(*c*) 9 Ch. D. 125.

that the plaintiffs should have the benefit of these covenants. It was held that the plaintiffs had no right to restrain the successors in title of one of the first named purchasers from carrying on the trade of smiths and wheelwrights, although it was admitted that the defendants had taken with notice of the restrictive covenants. Hall, V.C., after stating that it is well settled that the burden of a covenant entered into by a grantee in fee for himself, his heirs, and assigns, is binding upon the owner of lands who has taken with notice, asks "Who then (other than the original covenantee) is entitled to the benefit of the covenant? From the cases of *Mann* v. *Stephens*, *Western* v. *Macdermott*, and *Coles* v. *Sims*, it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others, where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant (contract?) need not be express, but may be collected from the transaction of sale and purchase." The Vice-Chancellor then points out that, in considering this question of implied contract, it is important to attend to the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property or to its being only obtained to enable the covenantee more advantageously to deal with his property; and also to notice whether the purchaser complaining is the purchaser of all the land

retained by his vendor when the covenant was entered into, and if he is not, whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant, though whether the purchaser claiming the benefit of the covenant has entered into a similar covenant is not so important.

This case was affirmed on appeal (*d*), when the language of the Vice-Chancellor was adopted in its entirety.

The Nottingham Patent Brick and Tile Co. v. *Butler* (*e*) is another case where the doctrine has been clearly stated. There the owner of certain land divided it into building lots and offered all the lots for sale by auction, subject to certain restrictions, when some lots were sold, and then at other auctions and by private sale the remaining lots were disposed of, each purchaser entering into a covenant that the land was not to be used for the purposes of a brick yard, and also covenanting to observe certain building restrictions.

Wills, J., held that it was clear that all the lots were sold upon the same terms, and that the intention was that each purchaser should be protected by the covenants entered into by the other purchasers, and he held that a sub-purchaser, taking with notice of the restrictive covenants, was bound by them, and could be restrained at the suit of a co-purchaser from violating them. He says (p. 268), "The principle which appears to me to be deducible from the cases is that where the same vendor, selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant

(*d*) 11 Ch. D. 866.
(*e*) 15 Q. B. D. 261.

for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit."

He then goes on to consider what circumstances may properly lead to the inference that covenants are or are not intended to be for the common benefit of all the purchasers. If purchasers were not aware that such covenants had been entered into by other purchasers, it would go far to show that they were not relying upon them or intended to have the benefit of them; but if a vendor sells or tries to sell all his property subject to certain restrictions, and tries to carry out what may be called a building scheme, the inference would be that the restrictions entered into by each purchaser are intended to be for the common benefit. The case was affirmed on appeal (*f*), and the doctrine laid down by Wills, J., approved.

Lord Esher, M.R., says (p. 785), "There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property with no then existing intention of selling the rest, and subsequently there is a sale of another part; then as regards the later sale, you cannot look at the conditions of the former sale, you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others."

The principles laid down in these two cases have recently received the approval of the House of Lords in *Spicer* v.

(*f*) 16 Q. B. D. 778.

Martin (*g*), and may now be accepted as definitely settling the law so far as in them it is dealt with. In *Spicer* v. *Martin* there was a purchase by one purchaser of seven houses from the same vendors, the conveyance of each house containing a covenant by the purchaser not to carry on or permit to be carried on any trade or business, and to keep the house as a private dwelling house, and each conveyance having attached to it a plan showing the mode in which the property was laid out. The plaintiff was a lessee of one of the houses, and was held entitled to restrain the lessees of some of the other houses from turning them, with the consent of the representatives of the lessor, into an hotel. In the Court of Appeal (*h*), relief was afforded on the ground of an implied contract arising out of certain representations made when the negotiations for the lease were being carried on, but in the Lords the correctness of the decision on this ground was doubted, and the judgment was upheld on the broader principle that each lessee was bound by and entitled to the benefit of the restriction, the language of *Renals* v. *Cowlishaw* being quoted, and that case and *Nottingham Patent Brick and Tile Co.* v. *Butler* being approved. "If," said Lord Macnaghten, "the site of the houses had been put up for sale by auction in building lots according to a plan corresponding with that on this lease, and if the conditions of sale had prescribed that houses should be built such as those which have actually been erected, and that every purchaser should bind himself by a covenant, in the terms of the restrictive covenant now in question, no one, I think, could have doubted that each purchaser would, as against the vendor, and as against every co-purchaser, have had a right to the benefit of the covenant, although there might have been no direct stipulation to that effect, and no express provision for mutual covenants by the purchasers *inter se*." The vendor having given an invitation to the public to buy portions of an estate bound by a general law, calculated to add to the comfort or security of the purchaser, and having got the benefit of

(*g*) 14 App. Cas. 12.
(*h*) 34 Ch. D. 1.

the increased price due to this provision, cannot destroy the value of the thing sold by authorizing the use of a part of the estate for a purpose inconsistent with the law by which he professed to bind the whole.

There are some cases later than *Renals* v. *Cowlishaw* that it is unnecessary to refer to in detail, as nearly all profess to follow the principles there laid down. In *Taite* v. *Gosling* (*i*), the covenant in question was expressly made with the vendor and the owners of any other land to which the benefit of the stipulations might attach, and a lessee of another purchaser was held entitled to enforce it; the important point in the case being that an assignee of a part interest may enforce the covenant.

Thornewell v. *Johnson* (*j*) is another case of direct covenant with other owners. One purchaser leased his lot and the lessee sub-let. The sub-lessee was restrained from violating the covenant. The covenant is there treated as actually binding the land itself, and notice is said to be unnecessary (*k*).

In *Collins* v. *Castle* (*l*), the doctrine was held to apply where the estate in question was sold in lots at different times, and different lots were subject to different restrictions, and some were not subject to any, and the judgment is valuable as dealing with a mode of sale that is now by no means uncommon, a large property offered in what may be called tracts of different classes of eligibility but all forming part of a general harmonious scheme.

Assuming that the right to enforce restrictive covenants originally exists, that right may, under some circumstances, be lost. In the case of *The Duke of Bedford* v. *The Trustees of the British Museum* (*m*), the purchaser of certain land entered into a covenant not to use the land in certain specified ways, the object being to prevent interference with certain adjoining land retained by the vendor. Afterwards the

(*i*) 11 Ch. D. 273.

(*j*) 44 L. T. 768; 50 L. J. Ch. 641; 29 W. R. 677.

(*k*) And see *Nicholl* v. *Fenning*, 19 Ch. D. 258; *Sheppard* v. *Gilmore*, 57 L. T. 614; 57 L. J. Ch. 6; *Re Fawcett & Holmes*, 42 Ch. D. 150.

(*l*) 36 Ch. D. 243.

(*m*) 2 My. & K. 552.

vendor used the adjoining lands in such a way as to make the restriction of no value, and it was held that the covenant could not be enforced in equity. The vendor was left to whatever rights he might have at law. So in *Roper* v. *Williams* (*n*), it is stated that where a landlord relaxes in favour of some tenants a covenant entered into for the benefit of all, he is not afterwards entitled to restrain other tenants from infringing the covenants; and in *Eastwood* v. *Lever* (*o*), acquiescence in a previous breach of a building restriction was held to be fatal to the right to enforce it, though the covenants in question were expressly stated to be for the benefit of all persons taking under conveyances from the covenantee. *Peek* v. *Matthews* (*p*), is a case frequently referred to in this connection. There the vendor took from each of several purchasers of plots of building land a covenant to build only in a certain manner, but afterwards permitted material breaches of the covenant to be committed by some of the purchasers. It was held that he could not afterwards enforce the covenant as against other purchasers, and that it was immaterial whether the covenant had been entered into with the vendor alone or by each purchaser with all the other purchasers; or whether the breaches acquiesced in had or had not been committed before the purchase by the particular defendant who happened to be attacked (*q*). If however the previous breaches are unimportant, there is no objection to afterwards enforcing the observance of the covenants (*r*). Nor if the previous breach acquiesced in is one that did not really affect the person who complains of the subsequent one, for example, if it is something affecting a part of the estate at a distance from that part owned by the person complaining (*s*).

So, too, the person complaining may himself have committed slight breaches of the building restrictions and yet

(*n*) Turn. & R. 18.

(*o*) 4 DeG. J. & S. 114; 33 L. J. Ch. 355; 12 W. R. 195.

(*p*) L. R. 3 Eq. 515.

(*q*) And see *Gaskin* v. *Balls*, 13 Ch. D. 324.

(*r*) *Richards* v. *Revitt*, 7 Ch. D. 224.

(*s*) *German* v. *Chapman*, 7 Ch. D. 271; *Jackson* v. *Winnifrith*, 47 L. T. 243.

be entitled to restrain important breaches by any co-purchaser. Thus in *Chitty* v. *Bray* (*t*), there were restrictions as to the frontage and rear lines of buildings to be erected. The plaintiff had slightly deviated from the frontage line covenanted to be observed, and had deviated very substantially from the rear line covenanted to be observed. It was held however that these deviations might be looked upon as divisible, and that the plaintiff was entitled to restrain the defendant from a threatened substantial deviation from the frontage line.

In *Sayers* v. *Collyer* (*u*) a building estate was sold in lots, each purchaser entering into a restrictive covenant with the vendor, and with the owners of the other lots entitled to the benefit of the covenant, for the purpose of preserving the property as residential property. There were numerous infractions of this covenant, and it was held that a purchaser who sought to restrain a certain infraction of the covenant that had gone on to his knowledge for three years could not succeed, the Court being of opinion that the character of the property had so changed that the purpose of the covenant failed and could not be enforced. On appeal (*v*) it was held that a change in the character of the property is not a reason for depriving the plaintiff of his right of enforcing the covenant, unless the plaintiff himself has done acts causing or tending to cause that change, but that the plaintiff must fail on the ground of acquiescence in the particular breach complained of.

So, too, it may happen that owing to peculiar relations between the parties, the one cannot enforce a restrictive covenant as against the other. In *King* v. *Dickeson* (*w*), a purchaser of a lot, subject to restrictive covenants entered into with the vendor and the purchasers of other lots, mortgaged part of it, the mortgagee taking with notice of the restrictions, but not being expressly bound to observe them. After foreclosure the defendants purchased with notice of

(*t*) 48 L. T. 860.
(*u*) 24 Ch. D. 180.
(*v*) 28 Ch. D. 103.
(*w*) 40 Ch. D. 596.

the covenants but it was held that they could not be compelled at the suit of the maker of the mortgage to observe them. An obligation to observe the covenants could not be implied between mortgagor and mortgagee.

It may be observed in conclusion that before a litigious purchaser, after satisfying himself that there is a restrictive covenant binding his co-purchasers that he is entitled to enforce, proceeds to enjoy the luxury of compelling some supposed delinquent to observe that covenant, he should be very careful to see that the covenant is in fact broken. If not he may find himself in the unpleasant position of the plaintiff in *Worsley* v. *Swann* (*x*), who was told that a person who has covenanted not to use land for certain purposes will not be restrained from erecting a building seemingly adapted only for such purposes.

R. S. CASSELS.

TORONTO.

(*x*) 51 L. J. Ch. 576.

CONVEYANCING IN THE NORTH-WEST.

The recent decision of Mr. Justice Richardson, of the Supreme Court of the North-West Territories in *Re Boyle* (*a*) is one of the most important that has yet been rendered as an interpretation of the Territories Real Property Act.

From the moment the Act was passed it was somewhat difficult to determine whether it was, so far at least as regards lands patented before it came in force, compulsory or merely permissive. In an article, published in the February number of this magazine, the opinion was expressed that the Act was *practically* compulsory; that is, that while it was not necessary for an owner to come in under the Act to perfect his title, it was necessary that the lands should be brought under the Act if he wished to convey or mortgage, *i.e.*, that registration under the Act is essential to the validity of all instruments.

In *Re Boyle*, however, Richardson, J., has in effect held that an ordinary unregistered deed is effectual to pass the estate in lands that were already patented when the Act came in force, unless such lands have been voluntarily brought under the Act. The judgment appears to be based on sec. 6 of the Act, wherein it is enacted that "every deed or instrument conveying lands shall operate as an absolute conveyance of all such right and title as the grantor has therein at the time of its execution, unless a contrary intention is expressed in such conveyance." It would not, however, the writer submits, be unreasonable, in reading this section with the rest of the Act, to infer that the "deed or instrument" referred to is a deed or instrument under the Act, and, indeed, the judgment in question does not appear to refer to the clauses of the Act as to the necessity and effect of registration at all. These clauses are pretty fully dealt with by Messrs. McCaul and Bown, of the North-West Bar, which we have before mentioned, and we would refer

(*a*) 9 Occ. N. 506.

our readers to it for the argument as to the necessity of registration. There is no necessity to repeat it here at length.

The effect of the judgment in *Re Boyle* is to declare that there are two separate and distinct systems of conveyancing in force in the Territories, and that it is entirely optional with the owner of lands patented, before the Territories Real Property Act came into force, to employ the one or the other. He can, if he chooses, apply to have his land brought under the Act; or, on the other hand, if he prefers it, he can give an ordinary conveyance, which will be effectual, without any sort of registration, not only as between the parties, but as against all the world; and, since what is permitted to the original owner must also be lawful for his grantees, we have all the disadvantages of a system of secret conveyancing acknowledged as law in the Territories.

If this be indeed law, there would appear ample room for amendment. If this be an example of the simplication of titles affected by the T. R. P. Act, the sooner the Territories return to the Ontario system of registration the better.

X. Y. Z.

EDITORIAL REVIEW.

Queen's Counsel.

His Excellency, the Governor-General, has been pleased to appoint the following gentlemen to be Queen's Counsel: Lawrence G. Macdonald, John Dunlop, T. C. de Lorimier, F. X. Mathieu, Athanase Branchard, J. N. Poubot, A. L. W. Grenier, J. O. Joseph, N. W. Trenholme, C. B. Carter, F. L. Beigue, P. J. Coyle, H. C. St. Pierre, P. N. Martel, H. A. Turcotte, Horace Archambault, L. N. Anelin, Albert Bender, M. T. Hackett, Duncan McCormick, A. O. T. Beauchemin, Pouet Angers, J. N. Greenshields, G. G. Stuart, Simeon Beaudin, J. E. Faribault, M. J. F. Quinn, W. B. Nantel, R. D. McGibbon, L. J. Ethier, — all of the Province of Quebec.

His Honour, the Lieutenant-Governor, has been pleased to appoint the following gentlemen, for Ontario: Dr. Larratt W. Smith, J. J. Maclaren, John Leys, James D. Edgar, William Mulock, W. B. McMurrich, N. W. Hoyles, C. R. W. Biggar, G. H. Watson, D. E. Thomson, E. D. Armour, George F. Shepley, A. B. Aylesworth, W. Mortimer Clark, E. F. B. Johnston, John R. Cartwright, of Toronto; S. F. Lazier, J. M. Gibson, John Crerar, Henry Carscallen, J. W. Nesbittt, J. V. Teetzel, of Hamilton; Hon. David Mills, James Magee, G. C. Gibbons, of London; J. F. Lister, of Sarnia; H. P. O'Connor, of Walkerton; Richard Harcourt, of Welland; A. J. Wilkes, of Brantford; John Farley, of St. Thomas; John King, of Berlin; J. E. Harding, of Stratford; G. W. Wells, James Robb, of Simcoe; D. J. McIntyre, John A. Barron, Hugh O'Leary, of Lindsay; S. B. Burdett, R. C. Clute, of Belleville; A. L. Morden, H. M. Deroche, of Napanee; J. M. Machar, of Kingston; and A. F. McIntyre, and D. B. McTavish, of Ottawa.

It is rumoured that Dominion Patents will be issued to some of those gentlemen who have been selected by His Honour.

We hope that in transcribing the names we have not been guilty of any omissions; if so, the omission is entirely unintentional on *our* part.

The Appointment of Queen's Counsel.

The decision of the Supreme Court of Canada not having finally settled this right, though very decided individual opinions were expressed by some of the Judges, the Provincial Government of Ontario still claims the right to make such appointments. It is much to be regretted that the question should be left as it now stands. The honour and dignity of the Bar are at stake, and instead of the concurrence of the two Attorneys-General in the selection of those gentlemen who most merit the distinction, we have a jealous rivalry displayed in the distribution of patents among political friends.

No one can look at the lists of appointments made by the Dominion Government in Ontario without being struck by the fact that the selection, in very many cases, has been due to political friendship, rather than distinction at the Bar; and the same remark applies with equal force to the appointments made by the Provincial Government. The cause is unquestionably political rivalry. If one party is unduly favoured in making the appointments, the other naturally answers the challenge by heaping the honours on its own adherents—a sprinkling of the opposite party being in each case included in the favours, to show the fairness of the selection.

From the partizan's point of view, the distribution of silk may be regarded as the legitimate exercise of political patronage—and cheap at that. But from a purely professional point of view, the conferring of the distinction is no part of a party government's patronage. Owing to the manner in which the selections have been made in Ontario, the distinction has lost its original significance; it is no longer conferred for purely profes-

sional merit, but may be attained to by almost anyone who is consistently friendly to the party in power. The cases of refusal for political reasons to confer the silk on applicants of the English Bar in modern times are, we believe, exceedingly rare, and are always spoken of with disapproval; and the assent, as well as the refusal, for a like reason should receive the same condemnation.

The Attorney-General of Canada, equally with the Attorney-General of Ontario, is a member of the Bar of Ontario, though *ex officio*, and is given precedence over all others in our Courts. He is the guardian to a great extent of the etiquette of the Bar. To him the profession are entitled to resort, and from him to claim advice, as to matters affecting the honour and dignity, as well as the minor etiquette, of the Bar. But if his opinion of merit and the right to promotion and distinction is based to any, even the least, extent upon the political views of the individual members of the Bar, what confidence can those who are opposed to him in politics have in his decision? As the Attorney-General of the Province is a member *de facto* of the Bar, and so is more truly the head of the Bar in each Province, one would have supposed that his concurrence or assistance would have been sought in conferring the distinction. And so it might be if they belonged to the same political party — but political antagonism seems to over-ride courtesy in this politically overburdened country. And the dignity and honour of the Bar is thus made the sport of politicians.

We understand that the Attorney-General of Canada refuses to concur in submitting a case to the Courts in order to have the matter finally determined, relying on *Lenoir* v. *Ritchie*, 3 S. C. R. 575, as a sufficient guide to his Government. It is clear, however, that that case does not finally settle the matter, and however definite may be his own views as to the question, as long as the matter is one of reasonable doubt in the profession, and especially as long as the Attorney-General of a Province, having reasonable doubts and representing the interests of the profession, asks it, we can see no reason why the request

should not be granted. To do so would be to relieve some individual members of the Bar of the odium of raising the question. To refuse is to leave the Bar in doubt as to the proper course to pursue. We have two Attorneys-General to appeal to, and we find that they cannot agree. We cannot very well defer to both. The result is that when a member of the Bar is offered a Provincial patent, he cannot decline without some danger of being discourteous, and he cannot present his patent without some danger of appearing discourteous to those Judges of the Supreme Court who have expressed such decided opinions against the right of the Provincial Government to nominate and appoint Queen's Counsel.

We have proceeded upon the assumption that *Lenoir* v. *Ritchie* does not finally settle the question, and it is necessary to examine that case to ascertain what it really does decide. The Chief Justice was absent when this case was decided, and Mr. Justice Fournier did not think the case an appealable one, and therefore expressed no opinion. We are, therefore, ignorant of the opinions of two able Judges. Henry, Taschereau, and Gwynne, JJ., thought that the question was one of prerogative, and that the Provincial Act was void. Strong and Fournier, JJ., thought that no opinion should be expressed upon the validity of the Act, as it was not necessary. Strong, Fournier, and Taschereau, JJ., thought that the Act did not and could not affect the precedence of Queen's Counsel holding Dominion patents—and the question of precedence between a Dominion and a Provincial Queen's Counsel was the point at issue. Mr. Justice Taschereau, while holding that if the Act was intended to enable the Lieutenant-Governor to appoint Queen's Counsel it was void, expressed the opinion that it was valid as an Act regulating the precedence of the Bar, and providing for the appointment of Provincial officers under the name of Queen's Counsel, but not really having that dignity. Finally, the judgment of the Court appealed from was that the Provincial Act in question, and all Letters Patent granted thereunder, "are illegal and *ultra vires, in so far as they may affect the rank*

and precedence of Mr. Ritchie, as granted to him by the Letters Patent of 26th December, 1872;" and that was the judgment which was affirmed.

With judicial opinion in this state, how can the profession accept the decision as finally settling the matter? Out of the whole Supreme Court Bench, as at present constituted, there are only two Judges who have pledged their opinions as to the invalidity of the Provincial Act. It is an accepted maxim now that the constitutionality of an Act will not be passed upon unless it is absolutely necessary, and expressly comes into issue. The opinions on this point are not technically binding, and therefore the validity of the Act is open to question still in the Supreme Court, and there are four Judges on that Bench who have not given their views on it. Three of the present Judges decided that, as between Dominion and Provincial Queen's Counsel, the latter cannot outrank the former. But there could not be a question of precedence at all if the Provincial Queen's Counsel are not Queen's Counsel. The statement of the proposition to some extent involves the implication that they are. One Judge concedes to the Provincial Legislature the right to rank the Bar, subject to the paramount right of the Governor-General to appoint Queen's Counsel, and give them precedence. If the power be conceded to the Provincial Legislatures to rank the Bar, however, it raises the very important question whether this is not an exclusive right of legislation. All legislative powers exercised by the Legislatures are exclusive rights, and if the right to control and rank the Bar be once conceded, it must be conceded as an exclusive right. Now, as the Sovereign has the undoubted right to confer distinction on the Bar and promote its members, and as the Crown has assented to the British North America Act, by which the exclusive right to regulate the Bar has been allowed to the Legislatures, has not the prerogative right been suspended? That opinion is open to that criticism.

We must not be understood as combating the views expressed in the judgments. The reasoning on which the learned Judges proceeded who declared the Act invalid is luminous, and almost convincing. And, if the opinions are not technically binding, they ought, at least, to receive the gravest deference. A doubtful right may be exercised till disturbed by direct process; but a doubtful honour or dignity stands in a different light.

Since the decision in *Lenoir* v. *Ritchie*, it has been several times decided that the Provincial Governments have the right to appoint Justices of the Peace. In Bac. Abr. Tit. "Justices of Peace," it is said, "The constituting of Justices of Peace is inherent in and inseparable from the Crown;" and a note from Dalt. Just. 10, says, "This doctrine would seem to be the consequence of the king's being the fountain of justice." It is said, however, that the appointment of Queen's Counsel is no necessary part of the administration of justice, which is admittedly allotted to the Provinces. It is essential, however, that Counsel should be retained for the Crown in the administration of all criminal business, and sometimes in the administration of civil business. And if a retainer can be given by the Province in one case it can in several, and if in several, why not a standing retainer? Good authorities have conceded this quality to the patents of Queen's Counsel (see, for instance, per Gwynne, J., *Lenoir* v. *Ritchie*, p. 631), holding them to be cancelled, with all other retainers, upon elevation to the Bench. And it is common knowledge that a Queen's Counsel in England cannot appear in any case against the Crown without special leave.

It is rumoured that the Attorney-General of Ontario will proceed to have the matter again tested, with the view of having it finally set at rest. It is to be hoped that a victim will not be necessary. Under section 52, sub-sec. 5, of the Judicature Act, "no proceeding shall be open to objection on the ground that a merely declaratory judgment, or order, is sought thereby, and the Court may make binding declarations of right, whether any conseqential relief is, or could be claimed, or not." Under this

section, a declaration of the right might be obtained without obnoxious proceedings, as those in *Lenoir* v. *Ritchie* must have been to the gentlemen affected, and an appeal to the Judicial Committee would follow as a matter of course, if the Attorney-General were a party. And if the Ontario Court of Appeal felt itself bound by *Lenoir* v. *Ritchie*, an appeal direct to the Judicial Committee could be taken without the aid of the Minister of Justice.

BOOK REVIEWS.

The London Law Monthly. A series of English Law Books; latest editions.

This series deserves something more than a passing notice. It is not a monthly magazine, but a monthly issue to the profession of the latest editions of some of the most useful text books, at exceedingly low prices. The proprietors, instead of offering text books at so much per volume, or per work, as the case may be, make the following offer to the profession: — If you will pay us in advance the subscription price which we agree to accept, we will deliver to you in monthly instalments during the year, a certain number of text books. If any text book offered during the year is not acceptable, we will, within reasonable limits, substitute another for it, if within the series.

During the past year, 1889, the following books have been issued: — *Wilson's* Judicature Practice; *Wharton's* Law Lexicon; *Dale & Lehmann's* Digest of Over-ruled Cases; *Prideaux* on Conveyancing; *Lindley's* Company Law; and a special number, *Smith's* Manual of Equity. During the present year, 1890, there will be issued: — *Pollock* on Contract; *Addison* on Torts; *Smith's* Mercantile Law; *Williams* on Executors; *Roscoe's* Criminal Evidence; *Roscoe's* Nisi Prius Evidence. These works

are really the latest English editions, as they come from the press, and being sold in advance are delivered at low prices as a monthly series.

Wharton's Law Lexicon, and *Dale & Lehmann's* Digest, are exceedingly handy books for a working library. *Prideaux's* Conveyancing is by far the most suitable work for ready reference. Other works on Conveyancing are exceedingly valuable, more so, intrinsically, than Prideaux; but for compactness, conciseness and precision, it is unrivalled. As the Conveyancing Act, and the Vendor and Purchaser Act, are dealt with, it forms a valuable book of reference for Ontario practitioners. *Lindley's* Company Law, and *Pollock* on Contract, bear their own marks of approval. An entirely new work — a Judicial Dictionary — is on the press, and will be issued during the year. It is a dictionary of phrases and words commonly recurring in practice, with references to the various cases in which they have been discussed and judicially passed upon.

The Lawyer's (periodical) Statutory Record. Shewing supplementary, annuling, and repealing enactments, since the last Revised Statutes of Canada, and of Ontario. Sessions 1887, 1888, 1889. Compiled by A. H. F. Lefroy, Barrister-at-Law. Toronto: Rowsell & Hutchison, 1889.

We referred in a former issue to the first number of this periodical, which is designed to show the various alterations made in the Statutes since consolidation. It is never safe to rely on the Revised Statutes; we must always run through late Acts to see how far they have altered the revision. By consulting Mr. Lefroy's pamphlet the trouble and work are minimized.

THE

CANADIAN LAW TIMES.

FEBRUARY, 1890.

THE RIGHT TO APPOINT QUEEN'S COUNSEL.

THE recent action of the Dominion and Provincial authorities in respectively appointing long lists of Queen's Counsel in this Province has revived interest in the question raised a number of years ago as to the power to make such appointments, and as to the rights and position of the appointees.

The air is full of rumours about threatened attacks which are to be made upon the status, and the rights of precedence and preaudience of various appointees, and this induced the writer to prepare a brief for his personal use in the event of his having to meet such an attack. The writer has been requested to publish his brief for the convenient use of other members of the Bar, and he does so with the explanation that it is not presented as a finished essay or thesis upon the subject, but merely as a rough memorandum or collection of authorities upon which an argument may be based.

It will be noticed that the authorities collected are such as will support an argument from the Dominion standpoint. The case for the Province has been presented in a despatch from the Lieutenant-Governor of Ontario to the Secretary of State at Ottawa, dated 22nd January, 1886, and presumably prepared by Mr. Attorney-General Mowat, in which the Provincial view is so ably and forcibly stated as to leave little or nothing further to be said upon that side of the question. The State Paper in question is published in

the Ontario Sessional Papers for 1888, volume 20, part 4, No. 37

What is the Provincial Claim?—Mr. Mowat's said despatch states it as follows:—"My Government claim for the Lieutenant-Governor, both under the Provincial Statutes on this subject, and independently of them, the power of selecting Queen's Counsel *eo nomine* from the Bar of the Province, with the rights incident to the office of Queen's Counsel; and they claim for the Lieutenant-Governor, in like manner, the power of determining the right of preaudience amongst the members of the Provincial Bar in all Courts and matters over which the Provincial Legislature has jurisdiction."

In another portion of the same despatch, the following words are put into the mouth of the Lieutenant-Governor: "The Dominion Government can have no right to say what members of the Bar shall be Queen's Counsel in Provincial business with which that Government has nothing to do; and it is therefore admitted that the Lieutenant-Governor in Council has the right of selecting from the Bar such members of it as he may think fit for the actual conduct of such Crown business as belongs to Provincial jurisdiction."

Printed along with the said despatch is the following opinion of Sir Horace Davey and Mr. Haldane given to the Ontario Government, and dated 9th December, A.D. 1887:—

"1. We feel some doubt as to the power of the Lieutenant-Governor of any Province, other than Ontario and Quebec, to create Queen's Counsel, with or without the incidental privilege of preaudience. But in regard to Ontario and Quebec, we think, having regard to section 134, that the Lieutenant-Governors of the Provinces can create Queen's Counsel for the purposes of the Provincial Courts. Whether the Lieutenant-Governors can regulate the preaudience of the members of the Provincial Bars *inter se* is in our opinion one of some difficulty. On the whole we think not.

"2. We are of opinion that the appointment of Queen's Counsel is not a mere dignity or honour, but it is the

appointment to an office. We are therefore of opinion that a Provincial Legislature has power to authorize the Lieutenant-Governor to make appointments of Queen's Counsel for the purposes of the Provincial Courts. We rely mainly on the 4th head of section 92, which, in our opinion, did nôt receive sufficient attention in the case of *Lenoir* v. *Ritchie*. We also think that the Legislature can regulate the precedence of the members of the Bars in the Provincial Courts, as part of the organization of Provincial Courts, and therefore within the 14th head of section 92. We do not feel pressed by the argument of the Judges in *Lenoir* v. *Ritchie* that such an Act would be an interference with the prerogative of the Crown. Assuming that to be so it is a necessary implication from the language of the Act (which would be unmeaning without it), and would therefore bind the Crown. We think that the Ontario Statutes of chapters 3 and 4 of 1873 are valid."

The Appointment is an Exercise of the Royal Prerogative.—"The king is likewise the fountain of honour, of office and of privilege; and this in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank; that people may know and distinguish such as are set over them, in order to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation and the hopes of superiority, may the better discharge their functions; and the law supposes that no one can be so good a judge of their several merits and services as the king himself, who employs them. It has therefore intrusted with him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such that deserve them. * * From the same principle also arises the prerogative of erecting and disposing of offices; for honours and offices are in their nature convertible and synonymous. All offices under the Crown carry, in the eye of the law, an honour along with them; because they imply a superiority of parts and abilities, being supposed to be always filled with those that are most able

to execute them. And, on the other hand, all honours in the original had duties or offices awarded to them. * * For the same reason, therefore, that honours are in the disposal of the king, offices ought to be so likewise. * * Upon the same or a like reason, the king has also the prerogative of conferring privileges upon private persons, *such as granting place or precedence* to any of his subjects as shall seem good to his royal wisdom (*a*).

"*To the Crown belongs also the prerogative of raising practitioners in the Courts of justice to a superior eminence*, by constituting them serjeants, etc., or by granting letters patent of precedence to such barristers as His Majesty thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and preaudience as are assigned in their respective patents (*b*)."

Queen's Counsel and Patents of Precedence.—"The first King's Counsel under the degree of Serjeant was Sir Francis Bacon, who made so *honoris causa*, without either patent or fee; so that the first of the modern order (who are now the sworn servants of the Crown with a standing salary), seems to have been Sir Francis North, afterwards Lord Keeper of the Great Seal to King Charles II. These King's Counsel answer in some measure to the advocate of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any case against the Crown without special license" (*c*).

"A custom has of late years prevailed of granting *letters patent of precedence* to such barristers as the Crown thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and preaudience as are assigned in their respective patents, sometimes next to the King's Attorney-General, but usually next after His Majesty's Counsel then being. These (as well as the King's Attorney-General and Solicitor-General) rank promiscuously with the King's Counsel, and together with them *sit within the Bar of their respective Courts*, but *receive no*

(*a*) 1 Blk. Com. 271-2.
(*b*) Chitty Prerog. 118; see also *Lenoir* v. *Ritchie*, 3 S. C. R. 575
(*c*) 3 Blk. Com. 27.

salaries and are *not sworn*; and therefore are at liberty to be retained in cases against the Crown " (*d*).

Queen Elizabeth made Mr. Egerton (afterwards Lord Ellesmere), one of her counsel so as to prevent him from acting in cases against the Crown. "It is related that happening to be in Court when Mr. Egerton was pleading in a case against the Crown, Her Majesty exclaimed, 'On my troth he shall never plead against me again,' and immediately made him one of her counsel, whereby he was entitled to wear a silk gown, and to have precedence over other barristers " (*e*).

" The King's Counsel were gratified with a salary of £40 per annum. The rank thus salaried was held to be an office under the Crown. Hence, when a Member of Parliament became King's Counsel he vacated his seat. This was in more cases than one a manifest inconvenience. A new election is ill relished by the member, and if he were of the party of the Government, the loss of a supporter was hazarded. A remedy suggested itself. By investing the fresh silk gown with a 'patent of precedency,' the person on whom it was conferred received no salary, and consequently was not an officer of the Crown, and thus retained his post. And he had this advantage: He was to take precedence next after the King's Counsel last made, and his leadership at the Bar was thus secured to him. He had also the right to be called within the Bar " (*f*).

" The counsel practising in the different Courts have a certain *precedence among themselves*; but their *precedence elsewhere* seems undeterminate " (*g*).

" The modern *degree* of King's Counsel must, it would seem, give *precedence everywhere*, because it is conferred by letters patent under the Great Seal; but that precedence is undetermined " (*h*).

(*d*) 3 Blk. Com. 28
(*e*) Campbell's Lives of L. C. (Ellesmere).
(*f*) Woolrych's Lives of Eminent Serjeants, p. xvii.
(*g*) Bowyer's Const. Law, 511.
(*h*) Bowyer's Const. Law, 512.

Blackstone says: "Preaudience in the Courts is reckoned of so much consequence, that it may not be amiss to subjoin a short table of the precedence which usually obtains among the practicers," and he then gives a table shewing that the King's Counsel rank along with the Queen's Attorney and Solicitor, next after the King's Sergeants, and next before serjeants at law (*i*).

Some interesting suggestions and authorities connected with the position of Queen's Counsel are collected in an article published in 17 Can. L. J. 74.

Right of Governor General to exercise the Royal Prerogative.—"The Governor General alone exercises the prerogative of the Queen in her name in all cases in which such prerogatives can be exercised in the Dominion by any one else than Her Majesty herself "(*j*).

The royal prerogative is as extensive in a colony as it is in England (*k*).

Mr. Justice O'Connor referring to the Governor General says: "He therefore exercises all the executive power which is vested in Her Majesty by the Act, and the prerogative powers of the Crown to the fullest extent that they are capable of being exercised in relation to the Dominion; that is to the fullest extent that is consistent with colonial dependence, for that is the effect of his commission and instructions" (*l*).

The Governor General has at least the right to exercise the royal prerogative in all those cases indicated by his patent, his commission and his instructions

The royal letters patent under the Great Seal of the United Kingdom making permanent provision for the office of Governor General of the Dominion of Canada bear date the 5th day of October, 1878.

They recite the 12th section of B. N. A. Act, and that it is desired to make permanent provision for the office of Governor General without making new Letters Patent on

(*i*) 3 Blk. Com. 28, note *a*.
(*j*) *Per* Taschereau, J., in *Lenoir* v. *Ritchie*, 3 S. C. R. 624.
(*k*) *Re Bateman's Trust*, L. R. 15 Eq. at p. 361.
(*l*) *Gibson* v. *McDonald*, 7 O. R. 421.

each demise of the office, and declare that there shall be a Governor General in and over the Dominion of Canada, and that the person who shall fill the said office shall, from time to time, be appointed by commission under the Royal Sign Manual and Signet. They then authorise and command the Governor General to do and execute all things that shall belong to his command and to the trust reposed in him according to the several powers and authorities granted or appointed him, by virtue of the British North America Act, and of these present Letters Patent, and of such commission as may be issued to him under the Royal Sign Manual and Signet; and according to such instructions as may from time to time be given to him under the Royal Sign Manual and Signet; or by Royal Order in Privy Council, or by Her Majesty through one of her principal Secretaries of State, and to such laws as are or shall hereafter be in force in the Dominion.

They then authorize the Governor General to keep and use the Great Seal of the Dominion for sealing all things whatsoever that shall pass the said Great Seal, and to constitute and appoint "in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, *and other necessary officers and Ministers of Our said Dominion as may be lawfully constituted or appointed by us*," and "so far as he lawfully may, upon sufficient cause to him appearing, to remove from his office, or to suspend from the exercise of the same any person exercising any office within Our said Dominion, under or by virtue of any commission or warrant granted by us in Our name or under Our authority."

The Royal Instructions to the Governor General accompany the said Patent, but they do not touch upon the matter which we are considering.

The Royal Commission to the Marquis of Lorne also accompanies the said Patent, and it authorises him to exercise and perform the powers and authorities granted by the Patent, according to such royal orders and Instructions as the Governor General for the time being hath already or may thereafter receive (*m*).

(*m*) Sessional Papers of Canada, 1879, No. 14.

It will be observed that in the opinion of Sir Horace Davey and Mr. Haldane, the appointment of Queen's Counsel is an appointment to an office, and that the Royal Letters Patent authorise the Governor General to appoint all such Judges, Commissioners, Justices of the Peace, and other necessary officers as may be lawfully constituted or appointed by Her Majesty. It cannot be open to doubt that those officers known as Her Majesty's Counsel might lawfully be appointed by Her Majesty, and therefore in the Dominion of Canada those officers may be appointed by the Governor General under the delegated authority conferred upon him by his Commission and his Royal Letters Patent.

Right of Lieutenant-Governors to exercise the Royal Prerogative.—" The Lieutenant-Governors of the Provinces of the Dominion, however important locally their functions may be, are a part of the Colonial Administrative Staff, and are more immediately responsible to the Governor General in Council. They do not hold Commissions from the Crown, and neither in power nor in privilege resemble those Governors, or even Lieutenant-Governors of Colonies, to whom, after special consideration of their personal fitness, the Queen, under the Great-Seal and her own hand and Signet, delegates portions of her prerogatives and issues her own instructions " (*n*).

" That, when anything which, according to the principles of the British Constitution, must be done in Her Majesty's name, has to be done by the Lieutenant-Governors of the Provinces, under the British North America Act, they are authorised to do it in Her Majesty's name, and are deemed then to act for Her Majesty, has not, that I remember, been denied by the appellant. But they are not Her Majesty's direct representatives, as the Governor General is. They have never been considered as such by the Imperial Authorities " (*o*).

(*n*) Despatch of Lord Carnarvon to Lord Dufferin, Sessional Papers of Canada, 1875, Vol. 8, No. 7.

(*o*) *Per* Taschereau, J., in *Mercer* v. *Atty.-Genl.*, 5 S. C. R. at p. 671.

It has been argued that section 65 of the B. N. A. Act authorises the Lieutenant-Governors of Ontario and Quebec to exercise the Royal prerogative in various ways, and among other things to appoint Queen's Counsel. Mr. Justice Taschereau disposes of this argument as follows:

"The purport of this section (which applies only to Quebec and Ontario) is to give them the powers previously vested in the Governors or Lieutenant-Governors, under any Act of the Imperial Parliament, or any Act of Upper Canada, Lower Canada, or Canada, and the dignity of Queen's Counsel does not exist in virtue of any such Act or Acts" (*p*).

The Lieutenant-Governors are appointed by Commission issued by the Governor General, and if the Lieutenant-Governors exercise any delegated royal authority we must seek for it in this Commission, or in the provisions of the B. N. A. Act.

Copies of all the commissions issued to the Lieutenant-Governors of the Province of Quebec from the time of Confederation down to the year 1877 are printed in Sessional Papers of Canada 1884, No. 77.

A copy of the commission issued to the Honorable John Beverley Robinson as Lieutenant-Governor of Ontario in 1880 is printed in the Sessional papers of Ontario 1882-3, No. 29. Accompanying this commission is an Order in Council, approved on behalf of the Crown and transmitted to the Lieutenant-Governor for his instruction and guidance, in which the Lieutenant-Governor is called a Dominion Officer, and is instructed how to act in that capacity.

All of these commissions to Lieutenant-Governors are issued by the Governor General for the time being, in the name of the Queen, under the Great Seal of Canada, and they authorize and command the Lieutenant-Governor to do and execute all things that shall belong to his command and the trust reposed in him, according to the several powers, provisions and directions granted or appointed him

(*p*) *Lenoir* v. *Ritchie*, 3 S. C. R. 620. See *Mercer* v. *Atty.-Genl.*, 5 S. C. R., *arguendo* at p. 552-3 for an argument against any such pretentions on the part of Lieutenant-Governors.

by virtue of the British North America Act, and of all other statutes and laws in that behalf, *according to such instructions as are therewith given to him, or which may from time to time be given in respect of the Province under the sign manual of the Governor General, or by order of the Privy Council of Canada, and according to such laws as are or may be in force within the Province.*

Power of Legislatures to legislate in respect of the Royal Prerogative.—In the despatch of the Lieutenant-Governor of Ontario to the Secretary of State at Ottawa, which has already been referred to, he refers to the Ontario Statutes respecting the appointment of Queen's Counsel and respecting precedence in the Courts, and says: "I am advised that the authority of a Provincial Legislature to pass such Acts as those in question is to be found in no fewer than four of the articles enumerated in section 92 as belonging to Provincial Legislatures, viz.: Articles 4, 13, 14, 16."

Speaking of sec. 92 of B. N. A. Act, Henry, J., says:— "The legislative powers given by sub-section 14 are full and complete as far as they extend, and *may be fully executed without including the right to provide for the appointment of Queen's Counsel.* Provisions for such appointments are not necessarily included in those for the administration of justice, or for the constitution and maintenance or organization of the Courts; and, as at the time of the passing of the Imperial Act, the Royal Prerogative in regard to them both had never been questioned in England, we are bound to consider, in the absense of express legislation, that its Parliament did not intend to interfere with its exercise, and did not intend to give the subordinate legislatures a power to deal with a subject which it had never itself exercised or contended for " (*q*).

Mr. Justice Taschereau takes the position that the Queen forms no part of the Legislatures, and that legislative enactments are not assented to by the Queen, and that the Queen is therefore not bound by any such enactments which purport to affect her prerogative, and that the Legis-

(*q*) *Lenoir* v. *Ritchie*, 3 S. C. R. 614.

latures can legislate with respect to the prerogative in those cases only which are strictly within the powers conceded to the Legislatures by the Imperial Statutes, and that when they attempt to go beyond these limits they are acting without jurisdiction (*r*).

Mr. Justice Gwynne speaks of "certain subordinate bodies called Provinces having *exclusive* jurisdiction though not 'sovereign' over matters specially assigned to them, of a purely local, municipal and private character, to which Provinces, by reason of this jurisdiction being so limited, were given constitutions of an almost purely democratic character, of whose Legislatures Her Majesty does not, as she does of the Dominion, and as she did of the old Provinces, constitute a component part; and to the validity of whose Acts, the Act which constitutes their charter does not even contemplate the assent of Her Majesty as necessary. The jurisdiction conferred on these bodies being purely of a local, municipal and domestic character, no such intervention of the sovereign consent was deemed necessary or appropriate; so likewise the power of disallowing Acts of the Provincial Legislatures is no longer, as it was under the old constitution of the Provinces, vested in Her Majesty, but in the Governor General of the Dominion in Council, and this is for the purpose of enabling the authorities of the Dominion to exercise that branch of sovereign power formerly exercised by Her Majesty in right of her prerogative royal, but to be exercised no longer as a branch of the prerogative, but as a power *by statute* vested in the Dominion authorities (the royal prerogative being for that purpose extinguished), and to enable the Dominion authorities to prevent the Legislatures of the Provinces, carved out of and subordinated to the Dominion, from encroaching upon the subjects placed under the control of the National Parliament, by assuming to legislate upon those subjects which are not within the jurisdiction of the Provincial Legislatures" (*s*).

(*r*) *Lenoir* v. *Ritchie*, 3 S. C. R. 623.

(*s*) *Mercer* v. *Atty.-Genl.*, 5 S. C. R. at pp. 711-12. In support of this pro-federal view see *arguendo* in *Mercer* v. *Atty.-Genl.*, 5 S. C. R. at pp. 542,

Provinces may legislate as to appointment of Provincial Officers.—Section 92 sub-sec. 4 of the B. N. A. Act provides that the Legislatures may make laws in relation to "The establishment and tenure of Provincial Offices and the appointment and payment of Provincial Officers."

It is upon this sub-section that the opinion of Sir Horace Davey and Mr. Haldane is chiefly based.

Acting under this authority the Ontario Legislature passed Ontario Statute 36 Vict. cap. 8 in the words following:—"Whereas in the course of the administration of justice, matters between the Crown and the subject are brought, some in Her Majesty's name and some in the name of the Attorney-General for Ontario, before Her Majesty's Courts in Ontario by the direction and under the control and management of the Provincial Government; and, whereas the Lieutenant-Governor of right ought to have the power to appoint, from among the members of the Bar of Ontario, Provincial Officers who may assist in the conduct of such matters on behalf of the Crown, under the name of Her Majesty's Counsel learned in the law, for the said Province * * Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. It was and is lawful for the Lieutenant-Governor, by letters patent, under the great seal of the Province of Ontario, to appoint from among the members of the Bar of Ontario, such persons as he may deem right to be, during pleasure, Provincial Officers under the name of Her Majesty's Counsel learned in the law for the Province of Ontario."

543, 552, 553, and see *Lenoir* v. *Ritchie*, *per* Taschereau, J., at pp. 622 and 625; and see *per* Gwynne, J., at p. 635. "Are Legislatures Parliaments?" by Fennings Taylor, cap. II.; and "Todd's Parliamentary Government in the British Colonies," 462-3; and see *per* O'Connor, J., in *Gibson* v. *McDonald*, 7 O. R. 422. See *contra per* Burton, J.A., in *Regina* v. *St Catharines Milling Co.*, 13 App. R. 164-6, and see *arguendo* in *Mercer* v. *Atty.-Gen.*, 5 S. C. R. at pp. 588 to 592 and 604 to 609, and *per* Ritchie, C.J., at pp. 637-8. and "The Powers of Canadian Parliaments," by S. J. Watson, Chapters XXI. and XXII; and see Despatch of the Lieutenant-Governor of Ontario to the Secretary of State at Ottawa, printed in the Sessional Papers of Ontario, Vol. 20, Part 4, No. 37.

Speaking with regard to the appointments made under the authority of a similar Statute of the Province of Nova Scotia, Mr. Justice Taschereau says:—"These *Provincial Officers*, it is true, are to be known under the name of Her Majesty's Counsel learned in the law for the Province of Nova Scotia. But that does not make them of the rank and dignity of that name grantable by Her Majesty, and the Statute does not pretend to make them so. It is a new Provincial Office under the name that has been created in Nova Scotia, and nothing more. The Legislature had in my opinion full power and authority to do so. They can create Provincial officers for the administration of justice and call their officers by any name they choose. There can be Provincial officers known as Nova Scotia Queen's Counsel, just as well as there can be Provincial officers known as Quebec Knights, Ontario Baronets, or Manitoba Lords" (*t*).

Right of Precedence.—It would seem that there is no doubt that the Provincial Legislatures may appoint or authorize the appointment of Provincial officers by the name of Queen's Counsel, to assist in the administration of justice, and that as between those officers the Legislatures may regulate all questions of precedence and preaudience, and that the Governor General, as representing the Queen, may select, and by letters patent, commission members of the Bar throughout the Dominion to be Her Majesty's Counsel; but the right of precedence and preaudience as between the said officers and the said Counsel raises a question which is not easy of solution.

The Ontario Statute 36 Vict. cap. 4, recites that "Whereas the regulation of the Bar of Ontario is vested in the Provincial Legislature, and it is expedient for the orderly conduct of business before the Provincial Courts, that provision be made for the order of precedence of the members of the said Bar in the Courts," and then makes provision for the precedence of the Attorney-General, etc., and enacts that the Lieutenant-Governor may grant a

(*t*) *Per* Taschereau, J., in *Lenoir* v. *Ritchie*, 3 S. C. R. 626.

patent of precedence in the said Courts to any member of the Bar, and that members of the Bar from time to time appointed after the first day of July, 1867, to be Her Majesty's Counsel for the Province, and members of the Bar to whom from time to time patents of precedence are granted shall severally have such precedence in the said Courts as may be assigned to them by letters patent which may be issued by the Lieutenant-Governor under the great seal, and that "The remaining members of the Bar shall, as between themselves have precedence in the Courts in the order of their call to the Bar."

Speaking with reference to a similar Nova Scotia Statute Mr. Justice Taschereau says:—"Though it may be legal in the enactment regulating the precedence of the Provincial officers under the preceding statute between themselves, it is *ultra vires* and unconstitutional in so much as it purports to regulate the precedence between Queen's Counsel named by Her Majesty herself, or by the Governor General in her name, and in so much as it purports to give to other members of the Bar precedence over such Queen's Counsel. The Provincial Legislatures cannot directly or indirectly interfere with Her Majesty's prerogatives, or with her acts done in the exercise of these prerogatives" (*u*).

The same Judge at page 629 says:—"The Provincial Legislatures have the right to regulate the Bar, but they cannot by any legislation, either directly or indirectly, limit or lessen Her Majesty's rights, or render them inoperative. They cannot in any degree lessen or take from the ranks and dignities which it pleases Her Majesty to establish and confer."

"In a memorandum prepared in 1872 by Sir John A. Macdonald as Minister of Justice he says:—"The undersigned is of opinion that the Legislature of a Province, being charged with the administration of justice and the organization of the Courts, may, by statute, provide for the general conduct of business before these Courts; and may make such provisions with respect to the Bar, the manage-

(*u*) *Lenoir* v. *Ritchie*, 3 S. C. R. 628.

ment of criminal prosecutions by counsel, the selection of those counsel, and the right of precedence as it sees fit. *Such enactments must, however, in the opinion of the undersigned, be subject to the exercise of the Royal Prerogative, which is paramount,* and in no way diminished by the terms of the Act of Confederation " (*v*).

Status of Queen's Counsel before the Privy Council.—Colonial Queen's Counsel are recognised as such by the Imperial Privy Council, while they appear before the Court in connection with appeals from their respective colonies, and in such cases they take precedence as between themselves and English Queen's Counsel, according to the dates of their respective appointments. This was determined as between Mr. Attorney-General Mowat and Mr. Scoble, an English Q.C., who were both of counsel in the Boundary Award Case (*w*).

It remains to be seen to what extent, if any, the Imperial Privy Council or the Supreme Court of Canada will recognize as Queen's Counsel those members of the Provincial Bars within this Dominion, who have received their appointments under Provincial authority.

It is also a question of interest whether the Imperial Privy Counsel would hear a Colonial Queen's Counsel upon an appeal from a colony other than his domestic colony, and whether the Supreme Court of Canada, upon objection being taken, would hear a Provincial Queen's Counsel upon an appeal from a Province of whose Bar he was not a member; but these questions lie beyond the scope of this brief.

How the Question of Status may be raised.—In a report of the Committee of the Privy Council, approved of by the Governor General in 1872, and sent to the Lieutenant-Governor of Ontario, the following suggestion occurs:—"By law a Superior Court Judge in Ontario has the power of deputing any of Her Majesty's Counsel to perform his judicial duties, both civil and criminal, at the assizes. In

(*v*) See 9 Can. L. J. 179.

(*w*) 20 Can. L. J. 299. See also 9 Can. L. J. 138, referring to 21 W. R. 313, showing that Mr. Dorion, a Canadian Q.C. had previously been recognized as such by the Privy Council.

case any of the counsel who have lately received commissions from the Lieutenant-Governor should act for a Judge at the assizes, and the invalidity of the commission be afterwards established, serious consequences might ensue, as all the proceedings in Court before him would be illegal and *coram non judice* to the great disturbance of the administration of justice both civil and criminal" (*x*).

Section 179 of the Criminal Procedure Act (R. S. C. cap. 174) provides that in a criminal trial, even though a prisoner do not adduce any evidence on his own behalf, yet the right of reply shall always be allowed to any Queen's Counsel acting on behalf of the Crown. If a prisoner should refuse to adduce evidence and deny the right of reply to the Crown counsel upon the ground that he is not a Queen's Counsel within the meaning of that Act, this would raise the question as to his status in a very direct manner.

The right of precedence and preaudience may be tested upon summary motion as was done in the case of *Lenoir* v. *Ritchie* already referred to, or as was done in the case of *Re H. J. Boulton, Q.C.* (*y*).

A person claiming a right to precedence may assert his claim by action (*z*).

In this Province a right to precedence may most conveniently be asserted in an action for a declaration of right, brought under the authority of section 52, sub-section 5 of the Judicature Act, which provides that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not."

A. H. MARSH.

(*x*) See 9 Can. L. J. 181.
(*y*) 1 U. C. R. 317.
(*z*) Bowyer Const Law 511.

EDITORIAL REVIEW.

Rights of Street Car Passengers.

A correspondent and old subscriber sends us a note of a case decided in California as to the rights of street car passengers with respect to payment of fares. In the case in question, *Barrett* v. *Market Street R. Co.*, the plaintiff tendered a $5 gold piece to the conductor (the smallest coin he had with him), and requested him to take out 5 cents, the fare. This the conductor refused to do, demanding the exact fare, and as the plaintiff was unable to produce the exact fare he was forcibly ejected from the car. At the trial he was awarded damages, and upon appeal the Supreme Court affirmed the judgment.

The argument used for the Railway Company was that the obligation to make change would amount to an obligation to trust large sums to the conductors for mere purposes of exchange, men whose financial responsibility was not considered in hiring them; that if it were reasonable to expect change for a $5 gold piece, it would be just as reasonable to expect it for a $10 piece, and the drawing of the line at any particular sum would be purely arbitrary. On the other hand, the Court held that they were not compelled to draw any line, but to determine only whether a reasonable sum had been tendered, and that $5 was a reasonable sum, it being practically the lowest gold coin in use in that part of the country; that the carriers might demand the fare before receiving the passenger, and might refuse to carry him if the fare could not be produced, but that this might be an evasion of their duty to carry, if it were found to be unreasonable; that the fare might be fixed at a sum that a passenger would never, or in very few cases, be prepared with, as 4½ cents—it once was 6¼—and it would be unreasonable to expect passengers to provide themselves with the exact fare. The Court guarded themselves against intimating that a tender of a $100 bill for one fare would be a reasonable tender.

Fulton v. *G. T. R. Co.*, 17 U. C. R. 428, was distinguished on the ground that the passenger had refused to say how far he was going and was put off. He then tendered $20 for a fare of $1.35. This was refused. The Court say that a railway conductor is not expected to be provided with change, as a place for selling tickets is provided.

Lawyers by Act of Parliament.

Our private acts contain not a few instances of this rapid and heroic method of annihilating time, by enabling gentlemen to evade the term of service generally required in order to qualify a candidate for presentation for admission. Latterly, however, the Legislature has wisely declined to interfere. It is difficult to imagine a case in which there should be any necessity for pursuing such a course. The Province is certainly not in want of lawyers.

For the present session notice has been given of an intended application to the Legislature to authorize a certain gentleman to present himself for examination before the Law Society without going through the usual course of education and service. No excuse of any kind is apparently offered for the particular case, and no extraordinary circumstances are shown in connection with it. The gentleman in question has for some time pretended to be a solicitor, so advertizes himself, and practises every branch of the profession that will not subject himself to proceedings for contempt of Court. A similar application to the Legislature by the same gentleman was refused before on the opposition of the Law Society, and it is to be hoped that it will be opposed and defeated again. No good reason can be given for granting exceptional facilities to any one who may choose to ask for them. The Law Society has just made a decided move in the direction of insisting upon a better education of students—and this was in harmony with the policy of the present administration the result of which was the establishment of a teaching Faculty of Law at the Provincial University—and it would be a most pronounced retrogression to dispense altogether at this period

with the restrictions lately placed on the whole body of students for the sake of one man.

A more appropriate Act would be one which would make it an offence to pretend to be a solicitor.

The Sittings for Trials.

We referred to the unequal distribution of business amongst the divisions of the High Court in a recent number. And at the same time we pointed out that the official returns of the Inspector of legal offices demonstrated that a better arrangement of the Toronto sittings would soon have to be made.

As usual the present sittings extend into the period fixed for the sittings of the Divisional Courts, and are likely to extend far beyond it. This deprives one of the Divisional Courts of one Judge. Much stress was laid upon the fact that by the re-arrangement proposed by the Bar the year before last Divisional Courts would frequently be composed of two Judges only; and this was said by some of the Judges to be such an objectionable feature that it would never receive their assent. The same result, mischievous in their judgment, is brought about by the present system in a still more objectionable form. There will come before the Divisional Court of Queen's Bench some cases in which either one of the two sitting Judges cannot sit. This will necessitate a change of Judges for the Toronto sittings in order to form a Divisional Court, to be followed by another change for a similar cause when another batch of cases come up for argument. Could any arrangement be more illogical, or show a greater lack of intelligent arrangement and symmetry? The present divisions of the Court do not depend upon jurisdiction, they have not the merit of convenience, they are based upon the lath and plaster of the walls only. When will the Bench awake to the fact that the arrangement of the sittings should be made for the expeditious and convenient transaction of public business, and not depend upon the shreds of tradition hanging in tatters on a name?

Queen's Counsel.

Since the last number was issued it has been announced that His Excellency the Governor-General has been pleased to appoint the following additional gentlemen to be Her Majesty's Counsel:—P. McCarthy and J. B. Smith, Calgary; John Secord, Regina; T. S. Kennedy, W. R. Mulock, H. J. Macdonald, J. S. Tupper, W. H. Culver, Isaac Campbell, Winnipeg; T. M. Daly, Brandon; William White, Moosomin.

The Ontario list has also been added to since our last number was issued by the appointment of the following gentlemen:—Richard Snelling, Thomas Langton, Toronto; J. W. Bowlby, Brantford; W. H. McClive, St. Catharines, J. F. Wood, Brockville; Elgin Meyers, Orangeville.

A Patent Ambiguity.

When a gentleman of the Bar receives a patent from the Lieutenant-Governor of a Province, giving him precedence next after those gentlemen who received patents from the same source in 1876, and at or about the same time receives a patent from the Governor-General giving him precedence next after those gentlemen who received patents from the same source in 1885, how is he to rank himself, first, with reference to himself, secondly, with reference to his brethren?

Ego et Rex Meus.

The Reporter of the Court of Appeal makes one of the learned Judges in *Re Harvey & Parkdale* say, "I do not think there is much difference of opinion between myself and the learned Chancellor." He is not without a respectable precedent, however, for in *Bowen* v. *Lewis*, 9 App. Ca. 912, Lord Blackburn said, "I wish to point out more distinctly than I could do before, what is the only point on which I think there is a difference of opinion between me and the Lord Chancellor."

BOOK REVIEWS.

A Handibook on The Conditional Sales Act, being an annotation of the Act respecting conditional sales of chattels (51 Victoria, chap. 19, Ont.), to which is appended a complete set of Forms. By JOHN AUGUSTUS BARRON, author of "Barron on Bills of Sales and Chattel Mortgages." Toronto: Carswell & Co. 1890.

Mr. Barron, the author of the well-known work on Bills of Sale and Chattel Mortgages, is well qualified to undertake the interpretation of the present Act, which was intended to be a piece of legislation cognate with the Chattel Mortgage Act, though the Legislature missed the mark. It is more than an annotation of the Act, though the author is modest enough so to style it, for it is in the form of a treatise, with references to numerous cases, English, Canadian and American. It will be found most useful to those who are engaged in commercial transactions as well as to the practising solicitor.

Digest of Insurance Cases, embracing the decisions of the Supreme and Circuit Courts of the United States, of the Supreme and Appellate Courts of the various States and Foreign Countries, upon disputed points in Fire, Life, Marine, Accident and Assessment Insurance, and affecting Fraternal Benefit Orders. Reference to annotated insurance cases in Editorials in Law Journals on insurance cases. For the year ending October 31, 1889. By JOHN A. FINCH, of the Indianapolis Bar. Indianapolis: The Rough Notes Company, 1889.

This is a very compact and handy Digest of Insurance Cases, and in addition to the arrangements usually relied on in a Digest there is an Index of the same character as a text book index.

General Digest of the Decisions of the Principal Courts in the United States. Refers to all Reports, official and unofficial, published during the year ending September, 1889. Annual, being Volume IV. of the series. Rochester: The Lawyers' Co-operative Publishing Co., 1889.

This huge volume of over 2,000 pages ought to carry out the scheme set out in the title page if it does not. Apart from its size, to one who desires to find what is in the American reports it is a rapid guide. Speedy as the issue is after the close of the judicial year, the publishers promise a speedier one next year.

HAMILTON LAW ASSOCIATION.

ANNUAL REPORT, 1889.

The number of members at the date of the last report was 69. Four new members have been added, namely, John G. Gauld, Stuart Livingstone, E. H. Ambrose, and W. S. McBrayne, and the present membership is 70.

The annual fees to the amount of $325 have been paid.

The number of volumes in the library is about 2,171, of which 200 were added during the year. The following periodicals are received, namely:—*The Law Times, The Times Law Reports, The Solicitors' Journal, The Albany Law Journal, The Canada Law Journal, The Canadian Law Times.*

The Treasurer's Report is submitted herewith, giving a detailed statement of the receipts and expenditure and of the assets and liabilities of the Association, and the same is also in the form required by the Law Society.

The Trustees have much pleasure in announcing that they have completed the English Reports by the purchase of the Admiralty and Ecclesiastical Reports and the addition of some other needed volumes; these are now on the shelves, and your Association has a library second only to that at Osgoode Hall, and will hereafter be able to devote more funds to the purchase of Text Books from time to time, and of such other books as may seem useful.

The Report of the Inspector of County Libraries was most favourable so far as your Association is concerned, and much credit is due to Miss Counsell, the librarian, for the manner in which she has discharged her duties.

The Law School is now in active operation, and appears to be working well. No definite opinion can be formed at present of the results that will be attained, but it should receive the support of the whole profession in its endeavour to provide for the better training of those who wish to join our ranks.

We would recommend that a committee on legislation be appointed for the coming year; the Bills of Exchange Act will, it is understood, be again introduced in the Dominion House, and other legislation may be expected in the Provincial Legislature, and the attention of the profession might be beneficially directed towards such bills as are from time to time brought before Parliament in which they are more particularly interested. We have no doubt that if the Associations throughout the country considered legislation more carefully it would result in fewer amendments being made to the existing law.

No action has been taken to carry out the suggestion of the Joint Committee of Law Associations that application to strike out a jury notice shall be determined before the action is entered for trial.

The complete fusion of Law and Equity is hampered by the distribution of business in Court and Chambers, and the continued existence of separate sittings at Osgoode Hall for the transaction of the matters belonging to the several divisions. Greater unity of practice would be attained if all business could be disposed of by any Judge with reference to the particular division in which the action is brought.

The Devolution of Estates Act has a much wider scope than was at first supposed, and it is suggested that authority should be conferred on the proper officers in the outer counties to act in these matters without the intervention of the Official Guardian, and so as to dispense with the necessity of any application to the Court at Toronto in what is at most an administration proceeding. Your Trustees consider these matters of vital importance to the profession, and would suggest the desirability of legislation to carry them into effect. No doubt, with the co-operation of the Associations throughout the country, much might be effected.

EDWARD MARTIN,
President.

E. E. KITTSON,
Secretary.

Hamilton, 2nd January, 1890.

THE

CANADIAN LAW TIMES.

MARCH, 1890.

MORTGAGES BY TRADING CORPORATIONS—SALES UNDER—DIRECTORS' RIGHTS AND DUTIES.

TO THE office of a director attach many of the liabilities of a trustee, the company being his *cestui que trust.*

Where a trading corporation has given a mortgage to secure a loan, it may happen that proceedings have to be taken under the security to realize the amount advanced, and a director, thinking he sees a way to save a portion of his investment, may desire to acquire the mortgaged concern either by purchasing in his own name or organizing a company having that object in view.

Under these circumstances what is his position? Can he be said to be both buyer and seller? Do his interest and duty so far conflict as to render the transaction void, or only voidable and capable of confirmation, or does his connection with a purchasing corporation so taint its whole existence as to affect their title as purchasers? Before entering into the discussion of this point it will not be out of place to notice the right or power which a trading corporation has to mortgage.

A company may not inaptly be compared to an agent, and the scope of the latter's authority may be defined by the nature of his employment, as in the case of a broker where the rules of the stock exchange may be binding on the principal, or the latter may by special instructions limit the authority.

A corporation created for the purposes of carrying on a business can exercise certain rights simply because they

are incidental to that business, and again it has other, and perhaps more limited, powers under its charter, although it might perhaps be more strictly said that its incidental powers are those which arise by necessary implication from a consideration of its charter.

Without considering the manner in which the company should act, the formalities which may be requisite, or the circumstances under which the assent of the shareholders may be necessary, it may be stated generally that a trading corporation can borrow money for the purposes of its business and can pledge its assets to secure the loan, and this not expressly by virtue of its charter power but because such a right is incidental, and indeed essential, to its operations. Business cannot be transacted without loans, lenders frequently require security, the necessity has given rise to the power. The power to borrow and secure is a part of the general corporate ability. "The true rule is that a company can mortgage unless expressly prohibited from doing so" (*a*). "No enabling power is requisite to confer the authority to mortgage, *prima facie* every corporation must be taken to possess it" (*b*). This rule is subject to the restriction that the company is acting in a manner not inconsistent with its charter power. In pledging its credit it must do so for the purposes of its business (*c*). If it were clear that the money was borrowed by the company to enable it to act *ultra vires*, for instance, to buy up its own shares if that were prohibited and the lender had notice of the intention, a mortgage given to secure the loan could not be sustained (*d*).

Under the Joint Stock Companies Act (*e*) a by-law sanctioned by the shareholders is a pre-requisite to a valid mortgage. The terms of this section should be strictly

(*a*) Sir G. Mellish, L.J , in *Re Patent File Co.*, L. R. 6 Ch. 83, at p. 88, where an equitable mortgage by the directors to secure a past due debt was sustained.

(*b*) Strong, J., in *Bickford* v. *Grand Junction*, 1 S. C. R. 696, at p. 739.

(*c*) *Hamilton's Windsor Iron Works*, L. R. 12 Ch. D. 707.

(*d*) *Re Marseilles Extension Co.*, L. R. 7 Ch. 161. See also *Walmsley* v. *Rent Guar. Co.*, 29 Gr. 484.

(*e*) R. S. O. c. 157, s. 38.

adhered to, although any action of the directors, if *intra vires* the company, might be ratified by the shareholders and the necessity of the by-law could thus be dispensed with (*f*).

If the transaction were *ultra vires* the company it would be incapable of confirmation even if every shareholder gave his consent—if within the company's power but irregular or voidable a subsequent ratification by the shareholders could be shewn (*g*).

In the leading English cases it is observed that a company incorporated under the English Companies Act with its memorandum of association does not possess such inherent rights as are at Common Law attached to every corporation (*h*).

The latter creation in its dealings with its property was subject to no restrictions save that it could not act in a way inconsistent with the objects of its creation. With this exception it had all the rights of a person (*i*).

A statutory corporation in England, however, has for its charter the memorandum of association—that defines its objects and sets a bound to its powers—there can be no ability save what is expressly granted or can be reasonably implied having in view the general scope of the company's business.

Our legislation (*j*) has proceeded on a different principle. It expressly recognizes powers and privileges incidental to the corporation (sec. 6), so that the principles laid down by the Privy Council must always be most liberally applied in construing the actions of our own corporate bodies.

To return to the main point for discussion. Assume a valid mortgage to have been given by a company, what position does a director of that company occupy if he is

(*f*) *Reuter* v. *Electric Tel. Co.*, 6 E. & B. 341; *Re Bonelli's Tel. Co.*, L. R. 12 Eq. 246; *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653; *Merchants Bank* v. *Hancock*, 6 O. R. 285.

(*g*) *Ashbury Co.* v. *Riche*, *supra*.

(*h*) *Ashbury Co.* v. *Riche*, *supra*; *Atty.-General* v. *Great Eastern*, L. R. 5 App. Cas. 473; *Wenlock* v. *River Dee Co.*, L. R. 10 App. Cas. 354.

(*i*) *Re Patent File Co.*, *supra*.

(*j*) R. S. O. cap. 157.

interested in another organization desirous of purchasing at a sale under the mortgage power, or if he would purchase himself?

Very few cases in point can be found either in the English or Canadian Courts. It is unquestioned law that neither a mortgagee, except in judicial sales where he obtains leave to bid, nor his trustee can purchase the mortgaged premises (*k*), and this rule has been extended to a trustee in bankruptcy, being also the mortgagee, and to the secretary of a building society mortgagees who bought it in (*l*).

A trustee of a mortgage must obtain leave and should also retire from his office before bidding (*m*).

The reason in all cases being that a man cannot be both buyer and seller, the Court does not allow him to occupy a position where his duty and his interest conflict. It is also quite clear that a director is not incapacitated from dealing with his own company—he can sell to it and vote on his shares to confirm the transaction (*n*).

The recent decision of *Farrar* v. *Farrars Limited* (*o*) has added something to the law on the subject, and it becomes necessary to refer briefly to the facts in this and some decisions in the Supreme Court of the United States.

Three mortgagees, of whom Farrar their solicitor was was one, sold under the power of sale contained in their mortgage to a company formed for the purpose of purchasing the property, which was partly promoted by Farrar, and of which he was solicitor. It was held that the sale could not be set aside simply because Farrar assisted in the formation of the company, was their solicitor and subsequently became a shareholder, but in view of Farrar's position, and of the conflict between his interest and duty, of which the company had notice, it was decided that the burden was thrown on them of upholding the sale. The subject is very fully discussed both by Chitty, J., and on

(*k*) *Coote* on Mortgage, 5 ed. 282, 432.
(*l*) *Martinson* v. *Clowes*, L. R. 21 Ch. D. 857.
(*m*) *Downes* v. *Grazebrook*, 3 Mer. 200.
(*n*) *Beatty* v. *N. W. Trans. Co.*, L. R. 12 App. Cas. 589.
(*o*) L. R. 40 Ch. D. 395.

appeal. It will be noticed that the solicitor, Farrar, had no intention of taking stock in the new company at the date of purchase by its representatives, and it was found as a fact that the property sold at a fair figure and that Farrar had made every effort to get the plaintiffs, the mortgagor, to pay off the mortgage, and had tried to obtain purchasers. Everything therefore was favourable to the validity of the transaction and still the onus was thrown on the new company of upholding the sale, because Farrar was connected with promoting the company, was its solicitor, and the *bona fides* of the transaction must be shown.

The Court points out that a sale by a member to a corporation is not a sale by a person to himself—a new entity with different rights is intervened—but it is stated later in the judgment that if Mr. Farrar had at the date of the sale been directly or indirectly one of the buyers the transaction could not have stood. If therefore he had been a member of the company at that date it is to be presumed the onus of proof as to the *bona fides* of the transaction would not have been satisfied. This will be considered further in connection with the next decision.

The Supreme Court of the United States has furnished a few decisions more or less in point—they are not cited in *Farrar* v. *Farrars*.

In the *Tunis Lick Oil Co.* v. *Marbury* (*p*) the defendant, a director of the plaintiff company, engaged in raising and selling petroleum, lent it $2,000, and this loan was secured by a trust deed conveying all the company's rights to a trustee to provide for payment of this debt, and with a power of sale. The note not having been paid, the trustee sold and the defendant bought in—he spent a large amount of money in developing the business, which became a profitable venture, and the company then sought, four years after the sale, to take the benefit of the defendant's efforts on the ground that he had abused his trust and that the sale was fraudulent. The plaintiff's bill was dismissed in view of this great delay in filing it, but the

(*p*) 91 U. S. R. 587.

various principles involved are discussed. The Court found all charges of fraud disproved and was satisfied that the defendant acted honestly and without in any way taking advantage of his position; that a director occupies a fiduciary position; that his duties must ever vary and cannot be defined; and that no hard and fast rule can be laid down; all this is fully recognized; the difficulty lies in the application. A director is not prohibited from lending to the company; he can take security, when he comes to realize he must act in the utmost good faith.

In this case the fact that a trustee was interposed was laid hold of; here was a disinterested third party brought in whose duty it became to realize who stood between mortgagor and mortgagee; and from whom the defendant, having a strict right to do so, bought. The delay in bringing the action was the ground of the decision, the dealing being voidable, not absolutely void; the plaintiffs were bound to assert their rights within a reasonable time, and this they did not do; had they come promptly seeking to redeem and willing to pay, their case would have been much stronger; the defendant's refusal would have thrown grave doubts on his *bona fides*; but by waiting, the positions were reversed, and it clearly appeared that it was the plaintiff company which was lacking in good faith.

It will be noticed that in *Farrar* v. *Farrars* no fraudulent scheme being established, it was held that the sale there was not, either in substance or form, a sale by a mortgagor to himself. In the *Tunis Co.* v. *Marbury* the plaintiffs came too late. The cases are decisions on these two points; in both much the same principles are discussed, and the reasoning does not conflict. The whole transaction is looked at in every case, its effect, and above all the *bona fides* of the parties.

Now, contrast the evidence in these cases with what appeared in *James* v. *Railroad Co.* (*q*). There the Lacrosse & Milwaukee Railway Company, in June, 1858, made a mortgage to one Barnes to secure a bond

(*q*) 6 Wall. 752.

issue of $2,000,000. The first payment of interest was not met, and the mortgaged property was at once sold to Barnes, who bought as trustee for the bondholders, who thereupon organized the defendant company. The sale was attacked by a judgment creditor of the old road. The circumstances connected with the whole transaction showed very gross fraud. The notice of sale stated that the whole mortgage debt and $70,000 interest was due, but as a matter of fact less than $200,000 had actually been advanced on the entire issue; a large amount remained in the company's hands, and the debts of the company were secured by the deposit of large blocks of bonds, which were then bought in by the directors at nominal prices, with the apparent intention of placing the whole issue in their hands. It is scarcely necessary to say that the transaction was set aside and the mortgage was declared to be only a security to the extent of the bonds in the hands of *bona fide* holders for value. "It needs no authority to show that such a sale cannot be upheld without sanctioning the grossest fraud and injustice to the Lacrosse & Milwaukee Co. and its creditors."

The principles to be applied to all transactions of this character are well laid down in *Wardell* v. *Railroad Co.* (*r*). In that case, owing to the nature of the country traversed by the defendants, the Union Pacific, the question of the fuel supply was most important, and the plaintiff undertook to provide for the company's consumption by the development and operation of certain mines along the railway then recently discovered. To carry out this project he entered into a contract with the defendants providing for their supply for the next fifteen years. The bargain was very one-sided and the contractor was to get a very high price. The seeming anomaly was explained when in the following year a company was formed composed chiefly of the directors of the defendant company, and to which the plaintiff assigned his contract without consideration. It subsequently appeared that this company was in contemplation when the agreement was first made. The defendants

(*r*) 103 U. S. R. 651.

having taken possession of the mines, the plaintiff brought an action to enforce the original agreement, but it was held that the dealing was a fraud on the defendants, and that the contract could not be sustained. The directors, when making the contract, were aware of the value of the concession; they looked to a participation in the profit, and prompted by the hope of gain, they forgot their duty to their company.

The Supreme Court in giving judgment stated the rule to be that "the law therefore will always condemn the transactions of a party on his own behalf when in respect to the matter concerned he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations and all persons who stand in a fiduciary relation to other parties and are clothed with a power to act for them are subject to this rule. They are not permitted to occupy a position which will conflict with the interests of parties they represent and are bound to protect."

The plaintiff, it might be added, being unable to enforce his contract received $100,000 from the defendants for his services in the matter.

These decisions are cited with approval in *Thomas* v. *Brownsville R. R. Co.* (*s*). This was an action for the foreclosure of a mortgage given by the defendant company to secure payment of a bond issue made to the contractors who had agreed to build the road. The contractors organized themselves into a construction company which had among its members two of the defendant company's directors, and when the contract was made and as a part of the whole transaction the construction company agreed with certain of the defendant company's shareholders to relieve them of their unpaid stock, representing a considerable liability. The whole contract was declared void on the principle laid down in the cases cited, and as some work had been done and bonds were in the hands of the contractors who performed it, these were declared a valid charge

(*s*) 109 U. S. R. 522.

on the undertaking to the extent of the work performed and not paid for as reported by the Master; as otherwise the shareholders bringing the action would have taken whatever benefit there was in the matter without making compensation, but coming to the Court for relief they must act equitably.

In view of the decisions referred to it is scarcely necessary to point out the extreme danger which a director runs in becoming in any way associated in the purchase of his company's mortgaged property and the chance there is of finding the dealing subsequently avoided at the instance of a dissatisfied shareholder or other person interested.

Where such a transaction becomes necessary the shareholders should be fully informed and their consent obtained, the director having the right to vote as a shareholder on such question, and a fair price must also be paid.

To ascertain if such dealings can, under the particular circumstances, be sustained, one must first ascertain if they will stand the test of *bona fides*. That is the key note of every decision, and everything bearing on this point will be carefully weighed and considered. All honest exertions made by a director will be accepted as indications of his good faith, while all acts capable of an ambiguous meaning will be construed most strongly against him.

Again, shareholders having rights to assert against such transactions must be active and vigilant or relief will be refused them—not only may they acquiesce in and confirm the transaction but they may sleep too long upon their rights.

E. E. KITTSON.

HAMILTON.

THE RIGHT TO APPOINT QUEEN'S COUNSEL.

In our last number our able contributor Mr. Marsh, collected a number of authorities in support of the view that the Governor-General has the right, and by inference the exclusive right, to appoint Queen's Counsel. It is our purpose now, not to exhaust the arguments in favour of the Provincial view, but to reproduce the arguments adduced on behalf of the Province of Ontario in a despatch from the Lieutenant-Governor to the Secretary of State of Canada. The despatch is referred to in Mr. Marsh's contribution, and is undoubtedly the result of the labours of the indefatigable-Attorney General of Ontario, and we may therefore be pardoned if we depart from the dignified nomenclature to which it is entitled, and in the fervour of composition refer to the paper as the Attorney-General's argument.

We shall attempt to reproduce the arguments not always in the words of the despatch, as they are in places diffuse, argumentative elaborations of the propositions enunciated, but shall condense them into statements of the various points with perhaps a little elaboration or explanatory illustration on our own part. For men's minds are reached by various channels and different modes of speech, and the same argument repeated in various forms, or elucidated by various illustrations gains rather than loses thereby.

We may premise the statement of the Attorney-General's views, by recalling to our readers that the crucial point has not been decided in a satisfactory manner by the Supreme Court. The state of judicial opinion is anything but settled. But two of the present Supreme Court Judges are committed to the opinion that the Provincial Acts are invalid. And the Courts of Ontario have consistently recognized the standing of Provincial Queen's Counsel, and still do so—five of the late appointments having been at the time of writing already recognized.

The despatch in question arose out of a communication from the Secretary of State of Canada in 1885 to the Lieutenant-Governor of Ontario asking for the names of those Queen's Counsel in Ontario who were appointed prior to 1867. As the Government of Canada was in possession of the names of those appointed by the Governor-General after 1867 information on that point was not desired. The information was sought for the purpose of transmitting it to the Secretary of State for the Colonies and the Judicial Committee of the Privy Council. The omission to ask for those appointed by the Province since 1867, was pointed enough to induce the Attorney-General to urge that their names should also be submitted, and to justify his demand on constitutional grounds. The despatch is dated 22nd January, 1886.

The first argument adduced, if argument it can be called, is that the Provincial Queen's Counsel have ever since appointment "been recognized as such in all Provincial Courts, without objection or question by the Bench or from other Counsel at the Bar." And to this we may add, at the risk of being charged with useless repetition, that the late appointments have been also recognized without question.

The opinion of Sir John Macdonald (Minister of Justice at the time) is then quoted. It is embodied in a report to His Excellency, dated 3rd January, 1872, and contains a case stated for the Law officers of the Crown in England. He stated therein that he was "of opinion that the Legislature of a Province, being charged with the administration of justice and the organization of the Courts" might "by statute provide for the general conduct of business before those Courts," and might "make such provisions with respect to the bar, the management of criminal prosecutions by counsel, the selection of these counsel, and the right of pre-audience," as such Legislature should see fit; but that such an enactment must "be subject to the exercise of the royal prerogative, which is paramount and in no way diminished by the terms of the Act of Confederation." The Law officers answered this by saying that "the

Governor-General has now power as Her Majesty's representative to appoint Queen's Counsel, but that a Lieutenant-Governor appointed since the union came into effect has no such power of appointment"; and further that "the Legislature of a Province can confer by statute on its Lieutenant-Governor the power of appointing Queen's Counsel, and that with respect to precedence or pre-audience in the Courts of a Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor-General and the Lieutenant-Governor."

In consequence of this our Provincial Act was passed respecting precedence at the Bar, and giving power to the Lieutenant-Governor to appoint Queen's Counsel and regulate the precedence of members of the Bar. There is therefore a consensus of opinion upon this, that the Legislature, having power to administer justice and regulate the Bar, has power to authorize the Lieutenant-Governor by patent to do the same. In the opinion of the Law officers the right to determine precedence and pre-audience is an exclusive one, and the Provincial Legislature can give precedence to a Provincial Queen's Counsel over one appointed by the Governor-General.

Though the opinion is stated more with the object of committing the Dominion Government to the view that the question has an arguable side for the Provinces, and that therefore a case ought to be agreed upon for argument, very important deductions may be drawn from it.

And, first, two notable things are to be observed here. First, that the exercise of this power by the Lieutenant-Governor is the exercise of a statutory right, if it is not the exercise of a prerogative right of the Sovereign. This disposes of all arguments based upon the inability of the Lieutenant-Governor to exercise the Royal Prerogative; and the question to be determined is not, whether the Governor-General or the Lieutenant-Governor can exercise the Royal Prerogative, but whether the Governor-General can exercise it all, the right having been converted into a statutory power exercisable by the Legislature

and those to whom it may lawfully depute its power. Secondly, the right of regulating precedence or pre-audience in the Courts is an exclusive legislative right of the Legislature, abandoned by the Crown to the Legislature, unless it can be shown that the Sovereign retained her Prerogative right when assenting to the British North America Act. The two must be kept distinct. For there may be a patent of precedence granted without constituting the recipient a Queen's Counsel.

It has often been said, if the Provinces have not the right to appoint Queen's Counsel, how can they give themselves the power by passing an Act? That is a loose way of expressing the result of careless consideration. If the Lieutenant-Governor has not the power, how can the Provincial Legislature give it him, is the correct way of expressing this proposition. In our opinion the solution is as we have already expressed it. The Legislature is charged with the regulation of the Bar, the maintenance and organization of the Courts, and the administration of justice. These are exclusive legislative rights. The right to erect courts and appoint justices were no less prerogative rights than the power to regulate precedence at the Bar. The first two powers have become statutory, and in our case have become exclusive statutory rights of the Legislatures, to the Act creating which the Sovereign has assented. If the regulation of the Bar has also become an exclusive statutory right by the same Act, has not the prerogative right disappeared. If a Court were erected in Ontario by the Sovereign upon the assumption that the old prerogative right still existed unimpaired, it is beyond question that its authority would be exceedingly doubtful on account of the terms of the British North America Act. Why should the prerogative right to regulate the Bar be a more vigorous one? It has been decided over and over again that Justices of the Peace may be appointed by the Provinces—the exercise of a power that was formerly a Royal prerogative one. If they are Justices of the Peace at all they have as much dignity and authority as if appointed under the Royal sign manual. And if Queen's Counsel are

created in the same manner they must be of the same dignity as if nominated by Her Majesty, Mr. Justice Taschereau to the contrary, notwithstanding. The oft quoted expression of the Judicial Committee, that a Colonial Legislature has and is intended to have plenary powers of legislation as large, and of the same nature as those of Parliament itself is apposite.

It appears, therefore, that a prerogative right may disappear and become a legislative right by the assent of the Sovereign to an Act which either claims jurisdiction or delegates it to an inferior legislative body; that the prerogative right to erect courts has probably become a legislative right of the Provincial Legislatures, and that similar rights, such as the appointment of justices and the regulation of rank at the Bar, have likewise been claimed as legislative rights by an Act assented to by the Sovereign.

It may be urged, however, that if the Legislature has the right of regulating the Bar, it cannot delegate it. It was argued in the case of the License Commissioners that the Legislature could not delegate its functions, but the Judicial Committee decided that the Legislature had the right to delegate to the commissioners the making of regulations with penalties for their breach which the Legislature might have made itself.

It will perhaps be conceded, then, that the Legislature can authorize the Lieutenant-Governor to do what it might itself do by legislative enactment, *i.e.*, rank the Bar as amongst themselves; and to do it in the ordinary manner in which the Lieutenant-Governor performs other acts of the same kind, namely, by the granting of Letters Patent.

The opinion of the law officers was cited to the Supreme Court in *Lenoir* v. *Ritchie*, but the learned Judges declined to concede that it was in anyway binding on them or that it expressed the assent of the Crown to the Provincial Acts, in both of which opinions they were undoubtedly correct. But the deductions which we have ventured to draw from it, which depend not only on the opinion but upon other reasons as

well, were not made the subject of argument, and were not dealt with by the Court. Sir Horace Davey and Mr. Haldane concur in the opinion that precedence at the Bar is subject to the regulation of the Legislatures; and this opinion which is printed at the end of the despatch was arrived at after consideration of *Lenoir* v. *Ritchie*. They say "we also think that the Legislature can regulate the precedence of the members of the Bar in the Provincial Courts as part of the organization of Provincial Courts, and therefore within the 14th head of section 92. We do not feel pressed by the argument of the Judges in *Lenoir* v. *Ritchie* that such an act would be an interference with the prerogative of the Crown. Assuming that to be so it is a necessary implication from the language of the Act (which would be unmeaning without it) and would therefore bind the Crown."

In Sir John Macdonald's opinion this right which the Legislatures have over the Bar is said to be subject to the paramount rights of the Crown to exercise its prerogative. In the opinion of some of the Supreme Court Judges, to concede the right to the Provinces to be exercised concurrently with the Governor-General would produce this dilemma, that precedence might be regulated by the Lieutenant-Governor to be disturbed by the act of the Governor-General, whose arrangement might again be disturbed by the Lieutenant-Governor. The proposition is therefore absurd, and the Lieutenant-Governor cannot exercise the right.

To take the last argument first. If, as the premiss is stated, each officer were exercising the prerogative right of the Sovereign as her delegate, the act of each would be the the act of the Sovereign: and if, as it is said, the letters patent of the Sovereign's representative could not be disturbed but by *scire facias*, neither of Her Majesty's representatives could disturb the order of precedence established by the other. So the absurdity does not exist. If on the other hand the letters patent could be avoided by the Sovereign or Her representative without *scire facias*, then the Sovereign by one accredited representative could by the act of another accredited representative disturb the order

of precedence established by Herself. For the act of each would be the act of the Sovereign. There is no absurdity in that proposition. The only question is, *would* the Sovereign do so if acting through the same representative always? If not, why should it be assumed that she would do so when acting through two accredited representatives, unless they were being prompted by advisers who were antagonistic to each other? This argument is based upon the assumed premiss that both officers are accredited representatives of the Sovereign; and the conclusion of the learned Judge is that as the result is absurd, the premiss is false. We think that when the proposition is logically considered the result arrived at is not absurd.

But it is not necessary to build upon the premiss assumed, namely, that both officers are the accredited representatives of the Sovereign. As we have already pointed out, the Sovereign, by assenting to the British North America Act, which gives the Legislature the exclusive right to regulate precedence at the Bar and to administer justice, abandoned the prerogative right to rank the Bar, and the Lieutenant-Governor now exercises that right by delegation from the Legislature. If this position is sound, there can be no absurd result, because he is exercising an exclusive legislative right, and the opinion of Sir John Macdonald that the legislative power is subject to the paramount rights of the Crown is unsound. For then the absurd result arrived at by the Supreme Court Judges would exist, and the precedence established by the Legislature could be disturbed by the Sovereign to be restored again by the Legislature until the Crown again interfered. If the Legislature has the right at all it must be an exclusive one, and one acquired not against the will of the Sovereign but with Her assent.

So much as to precedence and pre-audience. The question as to the right of the Legislatures to appoint Queen's Counsel, and whether that right is also an exclusive one, or one exercisable concurrently with the representative of the Sovereign, is a different question, and one more difficult of solution. It may be conceded for the purpose of the

argument without danger to it, that the Governor-General exercises the Royal Prerogative and exercises it exclusively in Canada as the only direct representative of the Sovereign in Canada, that is, to the exclusion of every one but the Sovereign. No one will claim, however, that His Excellency exercises the power in as full and ample a manner as the Sovereign herself might do. It would be folly to contend that he could confer the honour of knighthood, or grant a patent of nobility. The exercise of the prerogative must necessarily be confined to such matters as His Excellency has to deal with under the British North America Act as a constitutional Governor. The appointment of all Dominion officers, *i.e.*, the appointment of persons to such offices as are by our constitution essential to the exercise of the executive powers of the government of Canada, falls within his jurisdiction; and his appointments to such offices are, if not made in the exercise of a statutory right under the British North America Act, made in the exercise of the limited prerogative rights which he is authorized to exercise as Governor-General of Canada. No one will contend that he could as the representative of the Sovereign make appointments to Provincial offices. The Dominion has nothing to do with the administration of justice in the Provinces, and by inference, therefore, he cannot exercise the Royal prerogative in matters relating to the administration of justice which are Provincial affairs. All executive acts in Provincial affairs must therefore be either statutory rights exercisable by the executive authorities of the Provinces, or prerogative rights exercisable by the Lieutenant-Governor, and by necessary inference allotted or delegated to him by the distribution of powers under the British North America Act. Under the Provincial share of the division of powers fall all legislative as well as executive acts in the administration of justice. Hence, the intention of the British North America Act was that the Governor-General should not exercise the Royal Prerogative in such matters. If the reasoning is sound, it is the logical conclusion that the Governor-General cannot appoint Queen's Counsel for Pro-

vincial Courts. But the Attorney-General of Ontario does not, if we understand him, expressly contend that there is no such right, nor do Sir Horace Davey and Mr. Haldane express the opinion. They say, "with regard to Ontario and Quebec, we think, having regard to section 134 (*a*), that the Lieutenant-Governor of the Provinces can make Queen's Counsel for the purposes of the Provincial Courts." And further, "we are of opinion that the appointment of Queen's Counsel is not a mere dignity or honour, but it is the appointment to an office. We are therefore of opinion that a Provincial Legislature has power to authorize the Lieutenant-Governor to make appointments of Queen's Counsel for the purposes of the Provincial Courts. We rely mainly on the 4th head of section 92 (*b*), which, in our opinion, did not receive sufficient attention in the case of *Lenoir* v. *Ritchie*." The inference is plain, however. If it is an appointment to a Provincial office the Governor-General cannot make the appointment.

The argument of the Attorney-General adopts the view that the Executive acts of the Provincial Governments are acts done in exercise of the Royal prerogative, which by inference or actual enactment are committed by the British North America Act to the Lieutenant-Governor on the advice of his Council. The office of Queen's Counsel is really a Provincial office, because the administration of justice is confided to the Provinces. It has been recognized as an office in England. "The Statute of 6 Anne, c. 7, s. 24, provided that if any member 'shall accept of any office of profit from the Crown during such time as he shall continue a member, his election shall be and is hereby declared to be void; and under this Statute, an

(*a*) "Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant-Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following officers, to hold office during pleasure, that is to say,—the Attorney-General . . . and may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of those officers, and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof."—But does not this refer to the executive departments of government?

(*b*) "The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers."

appointment as Queen's Counsel was repeatedly held to be an 'office.'"

In illustration of the argument that many prerogative rights are vested in the Provinces, and are exercisable by the Lieutenant-Governor, the Attorney-General gives the following instances:—The property of the State is vested in Her Majesty; but Crown lands, mines, minerals and royalties belong to the Provinces. Public prisons are at common law the property of the Sovereign; but their establishment and management are assigned to the exclusive jurisdiction of the Provinces. The prerogative right of the Crown to institute corporations is undoubted; but the incorporation of all companies with Provincial objects is assigned exclusively to the Provinces. "It is thus manifest that the whole scope of the Act is opposed to the exclusion of matters of prerogative from Provincial jurisdiction, and to the notion that any prerogative right fairly falling within the general language employed is not to be included."

Again, justice is administered and the laws are enforced in the Queen's name by the Provinces, and all executive acts pertaining thereto are done in the exercise of prerogative rights. "As before Confederation, all Provincial proclamations are in her name; all grants of Provincial lands and property; all suits on behalf of the Province in cases in which by the Constitution and practice of England and of the Provinces before Confederation this would have been the form; all Commissions to judicial and administrative offices, including Masters, Stipendiary Magistrates, Police Magistrates, Justices of the Peace, Coroners, Sheriffs, Registrars and Crown Attorneys. The power of a Province to make these appointments may as well be denied as the power of appointing Provincial Queen's Counsel. They are all matters of prerogative. In a word, wherever before Confederation the Queen's name was used in regard to any matter now belonging to Provincial jurisdiction, it has ever since been used in all the Provinces. Hardly a day passes in which the Lieutenant-Governor does not exercise, or in which there is not exercised in his name, one or other of

the Royal prerogatives having reference to Provincial matters. Provincial Government could not be carried on without this being done; and the propriety of this mode of exercising executive powers, performing executive functions, and carrying on proceedings generally, has ever since Confederation been assumed to be the proper and necessary course by the Dominion and Provincial Governments, the Courts, the legal profession and the public."

Again, each Province has by the British North Amercia Act, a Great Seal, the emblem of Sovereignty. And further, "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen." Inasmuch as many executive acts must be performed by the Lieutenant-Governors, they must be for such purposes the representatives of the Sovereign for all Provincial purposes.

He then instances the old proprietary Colonies of America, in which the Governors were appointed by the proprietors under the Royal Charters; and the Governors so appointed are said by Chitty to have been the representatives or deputies of the King. "*A fortiori* must this character of being the Queen's representative in Provincial matters apply to a Lieutenant-Governor appointed under Imperial Statute by a Governor-General, the Queen's representative for this purpose, appointed by Her Majesty, and acting by the advice of 'the Queen's Privy Council for Canada.'"

In *Theberge* v. *Landry*, 2 App. Ca. at p. 108, Lord Cairns referred to an Act of the Legislature of Quebec as "an Act which had been assented to on the part of the Crown, and to which the Crown was therefore a party." "The assent," the Attorney-General goes on to say, "by the Lieutenant-Governor and the acquiescence in the Act by the Governor-General were treated as an assent by the Crown."

In this case it is important to observe that the question was whether the prerogative right of allowing an appeal to the Judicial Committee had been taken away by a Provincial Act.

The arguments for the Provincial view may therefore be shortly summed up as follows:—By the British North America Act the executive authority of the Crown is divided into that which may be exercised through the Governor-General in Dominion affairs and that which may be exercised by the Lieutenant-Governor in Provincial affairs. In each case the executive acts are prerogative acts of the Crown, and the two officers exercising the jurisdiction so divided are for their respective duties representatives of the Sovereign.

Or, if we regard the enactment of the British North America Act as converting the prerogative rights of the Crown into statutory rights, exercisable by the Governor-General or Lieutenant-Governor according as the matters fall within Dominion or Provincial jurisdiction, each is exercising a statutory right which excludes the authority of the other.

In either case the administration of justice, the organization and maintenance of the Courts, and the creation and regulation of a Bar, fall within exclusive Provincial jurisdiction.

EDITORIAL REVIEW.

The Toronto Assizes.

Mr. Justice Street has sat at Toronto continuously since the 7th January, and must leave the list unfinished to go on circuit on the 10th March. He was unable to sit in the Divisional Court, which sat during this period. The next Toronto Assizes commence on the 17th March, and will probably last until the Chancery Sittings commence. These will probably last until the Summer Assizes commence, which may or may not be finished before vacation. It must be recognized sooner or later that there is in reality almost a continuous sitting during the whole year, the summer vacation excepted, and provision should be made for freeing the Judge from all other engagements until he has finished the business, when he is assigned to take these sittings. An arrangement such as that suggested by the Bar Committee two years ago would be feasible and popular, and must before long be adopted. It is true that a great many of the cases tried at Toronto might as well be tried elsewhere. There is a tendency towards centralization, but as long as the rules respecting venue remain as they are, it cannot be said that the practice is unlawful.

The Minister of Justice.

The Minister of Justice, Sir John Thompson, being a member of the Bar of Nova Scotia, and having applied to the Benchers of the Law Society to be called to the Bar of Ontario, a special meeting of Convocation was held, at which he was called. The Court, on his being presented, dispensed with the oath of allegiance, and the Law Society remitted the usual fees. Considering the Minister's many and important engagements, it is a wonder the Society did not do the thing thoroughly by dispensing with his personal attendance and "calling" him by telephone.

REVIEW OF EXCHANGES.

Albany Law Journal.—24th August, 1889.

Assignments void because of preference, by GUY C. H. CORLISS. Some leading American cases are cited and the learned writer sums up his conclusions. When the property is abandoned all must be served alike; when the debtor gives a security in hope of pulling through he may embrace all his property. But a preference made with the intention of ultimately surrendering everything is void.

Ibid.—2nd November, 1889.

Coupons. With regard to presentment, coupons are unlike promissory notes, but rather resemble bills of exchange, which must be presented for payment before action can be brought. Many American cases are cited upon various phases of the subject.

Ibid.—16th November, 1889.

Spiritualism in Wills, by GEO. H. YEAMAN. In a New Jersey case of *Middleditch* v. *Williams* it appeared that a testator made his will under the belief that its provisions were desired and directed by the spirit of his deceased wife communicated to him through a medium. It was held that belief in spiritualism of that kind was not an insane delusion, and that the will was valid. The learned writer admits the correctness of the proposition but denies the correctness of the result, as it involves the proposition that a will dictated by another is not the testator's will. But that does not follow.

American Law Register.—July, 1889.

Statutory Liability for Causing Death, by CHARLES R. DARLING. Continued and concluded in September and October numbers. The various American Statutes founded on Lord Campbell's Act and the cases thereon are cited and discussed.

Ibid.—November, 1889.

Public Charities and the Rule of Respondeat Superior, by JOHN MARSHALL GEST. Two questions arose in a Pennsylvania case:—Is a public charity exempt from the rule of *Respondeat Superior?* What is the test or criterion of such a charity? These questions are discussed. The authorities seem to be conflicting. The first question was answered in the affirmative by one English case on grounds said to be untenable under English decisions. American cases conflict.

Central Law Journal.—6th September, 1889.

Cooling Time in Cases of Homicide, by SOLON D. WILSON. If after a quarrel there has been time for the passions to cool, and thereafter one kills the other it is murder, though if he had done it in the heat of passion and before he had had time to cool it would have been manslaughter. Though some American Courts have held that cooling time is a question of law for the Court, the proper rule seems to be that it is a question for the jury.

Ibid.—13th September, 1889.

Baggage, what is and is not, by W. W. THORNTON. Many instances, English and American, are cited of what has been held to be, and what has been held not to be, baggage. The general rule is that what the passenger takes for his personal use or convenience (and in some cases apparently also for his gratification) according to the particular class to which he belongs, either with reference to the immediate necessities or ultimate purpose of the journey, those articles so taken are baggage. Merchandise is not. It is interesting to know that in England it has been held that ordinary baggage does not include title deeds carried by an attorney for the purpose of procuring a new trial, nor bank notes (to a large amount) carried for the purpose of meeting the contingencies of the suit.

Law Journal.—3rd August, 1889.

Companies' Bills in a Wrong Name. Some remarks on a case in which directors had accepted a bill drawn in a name which resembled but was not the company's name.

Ibid.—10th August, 1889.

Contempt of Court in Ignorance of a Suit. The learned writer concludes some remarks upon this by saying, "The most important of these was the knowledge of the respondents of the pendency of the suit. Opinions will differ on the question of fact on this point in the case, but, on the question of law, it is difficult to see how the authority of the Court is to be maintained if it is necessary for the applicant to prove that the respondent knew the case was pending. The injury to the administration of justice is done whether he knew it or not. If the respondent was ignorant of the fact, it was none the less a contempt, but it is a contempt which can be easily purged."

Ibid.—17th August, 1889.

Can British Officials be Tried for Offences Committed in Foreign Countries. Concluded in the following number. A review of authorities on this point.

Ibid.—31st August, 1889.

Cab Proprietors' Responsibilities to the Public. Cases and statutes bearing on this are cited.

THE

CANADIAN LAW TIMES.

APRIL, 1890.

UNREGISTERED CONVEYANCES IN THE NORTH WEST TERRITORIES.

IN the February number of Volume 9, the writer, in conjunction with Mr. Bown of Calgary, published some notes on the Territories Real Property Act (*a*). Having pointed out that the first and most essential point to be determined was to what extent the Act was compulsory, and to what extent optional, the writers expressed the opinion "that the Act is *practically* compulsory; for though it may not be imperative to register the title in the first instance, still as soon as the owner comes to deal with his land, to mortgage or convey it, he can only do so after the registration of his title under the Act." That the writer and his colleague in publishing these notes were fully alive to their temerity in venturing to suggest interpretations of the Statute in advance of direct judicial decisions, a reference to the article referred to will readily prove; so that it is not a matter of surprise to find that recent decisions by Mr. Justice Richardson and Mr. Justice McGuire, of the Supreme Court of the North West Territories, are entirely at variance with the *a priori* construction placed upon the Statute by the notes referred to—a construction which formed the basis of the line of argument running through the whole article. In *Re Boyle* (*b*), and *Re Angus Thompson* (*c*) respectively, these learned judges have expressly decided that the essential premiss of that argument is false;

(*a*) 9 C. L. T. p. 24.
(*b*) 9 Occ. N. 506.
(*c*) 10 Occ. N. 44.

and that, with respect to lands patented prior to 1st January, 1887, registration is not essential to the validity of the conveyance, either *inter partes* or against third persons, at any rate when such third persons are execution creditors, even with duly registered executions.

It is hoped that the writer will not be thought guilty of the slightest disrespect to the learned judges who have given these decisions if he attempts to elaborate a little more fully the argument in favour of the views he had expressed before the question had had the light of judicial decision thrown upon it.

Mr. Justice McGuire, in interpreting section 4 of the Act, "all lands in the Territories shall be subject to the provisions of this Act," shows that there is a distinction between the words "subject to the provisions of the Act," and the words "under the provisions of this Act," and it is important to, at once, admit this distinction, and further, that it runs throughout the Act; that, in fact, the Act deals with two classes of land, carefully distinguished, namely: (a) lands actually "under the provisions of the Act," (b) lands not actually "under the provisions of the Act"—because the writer's argument is based on the view that, while all lands are subject to the provisions of the Act, some of these provisions relate only to class (a), others only to class (b), and others again to both classes. Bearing this distinction in mind, it will be found that the words "subject to" of sec. 4, mean something more than merely "meaning . . . liable to, or exposed to become so, whenever certain conditions are fulfilled." It is submitted that all lands are *actually* subject to the provisions of the Act, according to the ordinary and natural meaning of these provisions.

In support of the correctness of this view the judgment of Mr. Justice Taylor (concurred in on this point by Mr. Justice Killam) in *Re Irish* (*d*), may be referred to. Speaking of the 28th section of the Manitoba Real Property Act of 1885, he says (*e*): "That section enacts that 'From and after the commencement of this Act all lands unalienated

(*d*) 2 Man. R. 361.
(*e*) At p. 367.

from the Crown in the Province of Manitoba shall, when alienated, be subject to the provisions of this Act. Provided, however, that this section shall not apply to any lands to which the parties may be entitled under the Manitoba Act or any amendment thereof.' The date of the commencement of the Act is fixed as of the 1st of July, 1885, by the 2nd section. The intention of this section plainly is to render compulsory the bringing under the Act all lands, except lands to which the Manitoba Act applies, which were at the commencement of the Act unalienated, and afterwards alienated, while the bringing in of other lands is optional with the owners."

The reader would entirely mistake the object of this citation were he to suppose that it is quoted with the view of arguing that the Territories Real Property Act, simply by the operation of section 4, draws no distinction between lands patented, and lands unpatented, prior to its coming into force. It is cited as a definition of the words "subject to," to shew that the operation of the Act is not conditional, but that its provisions, according to their true and proper interpretation, must by virtue of the words "subject to" be applicable to all lands in the Territories.

Thus, as pointed out by Mr. Justice McGuire, section 44 of this Act provides the machinery for bringing lands patented after 1st January, 1887, "under the provisions of the Act," while section 45 does the same for lands patented prior to 1st January, 1887; but, while the two classes of land are distinguished, both are clearly *subject to* the provisions of the Act. The one class is subject to the provisions of section 44; the other to the provisions of section 45.

The force of the learned Judge's reasoning from the language of the amending Act of 1888 (*f*), has already been admitted in the former article (*g*); and, if the maxim *mentio unius exclusio alterius* were an absolute and irrebuttable canon of construction, it would indeed be difficult to controvert it. But since it is impossible not to agree with the opinion of the learned Judge himself, that the sections of the Act, re-

(*f*) 51 Vic. (D) cap. 20, sec. 4.
(*g*) 9 C. L. T. 24.

ferred to in the amending Act, were plainly of universal application, without travelling outside the original Statute, the Act of 1888 can only be regarded as another example of hasty and blundering legislation, only tending to confuse a situation already sufficiently complicated.

And now we come to the crucial point of the whole question, viz., the operation of section 59. Whether does this section apply to class (a) alone, or to class (b) alone, or equally to both? The section reads: "No instrument, until registered under this Act, shall be effectual to pass any estate or interest in any land . . . or render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass, or, as the case may be, the land shall become liable as security, etc. . . . And if two or more instruments executed by the same owner, and purporting to transfer or encumber the same estate or interest in any land, are presented at the same time to the registrar for registration and indorsement he shall register and indorse that instrument under which that person claims property, who presents to him the certificate of title of such land for that purpose."

Clearly, if this section is, as it appears to be on reading it alone, applicable to *any land* in the Territories its intention is that no unregistered instrument should be of any effect or validity, as a conveyance, transfer, etc., whether *inter partes*, or otherwise, whether with respect to lands patented before 1st January, 1889; or, it may be better expressed, that the section is equally applicable to class (a) or class (b), since it is, at present, wise to guard against expressing an opinion as to the operation of an unregistered deed by way of estoppel, or as an agreement to convey, which a Court of Equity would enforce *inter partes*.

It is interesting, and at the same time instructive, to observe that somewhat similar questions have, from time to time, been raised in the Courts, and that statutes providing for registration, some compulsory, some optional, are not uncommon in the history of English and Canadian

conveyancing. Thus the old common law Bargain and Sale, which became by the operation of the Statute of Uses (*h*) effectual as a legal conveyance without any deed or writing, was a secret mode of conveyance entirely repugnant to English traditions; and accordingly the Statute of Uses was quickly followed by the Statute of Enrolments (*j*), which required every bargain and sale of inheritance or freehold to be by indenture, *enrolled* within six months. The design of the Act was to prevent the secrecy which attended that mode of conveyance; and though it failed in its object it denoted that the policy of the law was against secrecy. The provisions of this statute were recognized as applicable to Upper Canada by the Legislature, which by the Statute 37 Geo. III. c. 8, provided that registry in the county registry office should be equivalent to enrolment (*k*).

The effect of the U. C. Registry Act, 35 Geo. III. c. 5, has frequently been before the Courts of that Province (*l*). The decisions on that statute show that "it is so framed as to prevent the first registry of a deed respecting premises which have never before been made the subject of an entry in the county register having the effect of rendering invalid a prior *bona fide* deed. A commencement must have been first made; the title to any particular estate must have become "*a registered title*" (*m*). This construction agrees so well with the decisions in *Re Boyle*, and *Re Angus Thopmson*, that these cases would be valuable precedents, were it not that they are based on the wording of the second section of the Act (*n*), which enacts that "a memorial of all deeds and conveyances . . . *may, at the election of the party, or parties concerned*, be registered . . . and that every deed or conveyance that *shall at any time after any memorial is so registered* be made . . . shall be

(*h*) 27 Hen. VIII. c. 10.

(*j*) 27 Hen. VIII. c. 16.

(*k*) See *Rogers* v. *Barnum*, 5 O. S. 252.

(*l*) *Neeson* v. *Eastwood*, 4. U. C. R. 271; *Doe d. Hennessy* v. *Myers*, 2 O. S. 424; *Doe d. Shibley* v. *Waldron*, 2 C. P. 189.

(*m*) *Per* Robinson, C.J., in *Doe d. Hennessy* v. *Myers*, *ante*.

(*n*) 35 Geo. III. c. 5, sec. 2.

adjudged fraudulent and void against any subsequent purchaser, etc."

The construction placed upon the Manitoba Real Property Act by the Court of Queen's Bench in *Re Irish* (*o*), has been referred to in the former article (*p*); but it is important to observe that the statute that was under review in that case contains no provision similar to section 59 of the T. R. P. Act.

It would no doubt help the elucidation of this question if an exhaustive examination of all the statutes providing for registration of conveyances, and of the interpretations placed on them by the Courts, could be made, but such an examination is only possible to those fortunate enough to have access to a reasonably complete library.

The statutes above mentioned have only been referred to with a view to showing that such questions as have arisen under the T. R. P. Act are not new, and that accordingly it would seem fair to argue that section 59 was inserted in the T. R. P. Act with the object of expressing the intention of the Legislature that registration is an essential to all conveyances of all, or any, lands in the Territories.

Let us examine the arguments against this view. In the first place it is urged that, from the use of the word "deed" in these clauses (secs. 5 to 17) which have been expressly declared applicable to all lands in the Territories, and particularly from its use in sec. 6, that the legislature must have intended to draw a distinction between *deeds*, not requiring registration under the Act, and *transfers*, requiring registration. On examining these sections, however, it will be found that the word "deed", when it occurs in section 6, is found in connection with the word "instrument," which clearly includes instruments to be used under the Act; while, where it occurs in section 10, we find that it is treated as equivalent to "conveyance or transfer." The words are "the grantees shall take according to the tenor of the *deed*, and they shall not take by entireties, unless it is so expressed in the conveyance or *transfer*," while in

(*o*) *Supra*.
(*p*) 9 C. L. T. 28.

section 11 we find that "a man may make a valid conveyance or *transfer* of his real estate to his wife"; and finally, if it had been the intention of the Act to restrict the application of the word "deed," we should have expected a definition to that effect in the interpretation clause.

As a matter of practice transfers under the Act are made by deed every day, while *Re Irish* (*q*) is an express authority that a deed in the old statutory short form (which was the case in *Re Angus Thompson*) is substantially in accordance with the forms given in the Act, the Manitoba Statute and the T. R. P. Act being practically identical as regards this point.

With regard to the sections under the heading "Effect of Registration", numbered from 58 to 64 inclusive, Mr. Justice McGuire points out that whereas section 58 expressly deals with lands "under the provisions of the Act," section 59 refers, equally expressly, to "any land," and he then expresses the view that section 59 applies only to "lands brought under the Act," under either section 44 or section 45. It is respectfully submitted that the very facts to which the learned Judge calls attention furnish the most cogent argument that section 59 is applicable to all classes of land in the Territories. Does not the principle *mentio unius exclusio alterius*, here apply with full force? Must we not conclude that the expression "any land" is deliberately used by the Legislature in section 59, in contradistinction to "land under the provisions of this Act" used in section 58? Is there any canon of construction which permits us to read into section 59 the words "under the provisions of this Act?" It is respectfully submitted that the expression "any land" must be deemed to be intended in its ordinary natural meaning, unless such an interpretation leads to manifest absurdity.

That the reference to the certificate of title in the concluding words of the section (*r*) produces no such absurdity, is plain when we examine the *modus operandi* of conveyancing in such cases. Were it otherwise those conveyancers

(*q*) *Supra*.

(*r*) Sec. 59.

who had relied on the position here contended for, could not possibly have made their practice square with their theory; but it is a matter of daily occurrence to transfer lands, patented prior to 1st January, 1887, and not already under the Act under sections 59 and 45. A., the owner of the lands, desires to convey to B. B. instructs his solicitor accordingly. The solicitor is handed the deeds showing A.'s title, and, having satisfied himself that the title is correct, draws the conveyance, or transfer, to B., which is executed in accordance with the Act. He then draws an application under section 45, to bring A.'s lands under the Act, which is executed either by A. or by B. under power of attorney. This application, with the title deeds, and conveyance to B., is then sent to the registrar. A.'s title is registered; then the conveyance to B. which *thereupon* conveys or transfers the estate to B., and a certificate of ownership is in due course forwarded to B. or his solicitor. It is not contended that the transfer from A. to B. can take effect without a certificate of title, but it is contended, and proved by daily practice, that the Act itself provides the machinery which enables A., and all others in the same position, to comply with the requirements of section 59.

Nor does there appear any irreconcilable inconsistency between sections 34, 59 and 64. Section 34 provides that *instruments*, dealing with land under the provisions of the Act, shall be "in accordance with the provisions" of the Act; section 64, that such instruments shall be *executed* in accordance with the Act, and that "after registration of the title to any lands under the provisions of this Act, no instrument shall be effectual to pass any interest . . . as against any *bonâ fide* transferee of the said lands unless such instrument is" so executed, and duly registered. Thus section 59 provides that registration is essential to the validity of all instruments; section 34 provides for the nature of instruments capable of registration, and section 64 for the method of *execution*, as well as for registration of the instrument. Even if there is any difficulty in construing sections 59 and 64 it amounts merely to a repetition, perhaps by way of greater caution, and it is certainly not

lessened by confining the operation of section 59 to lands "under the provisions of the Act."

The limits of this article will prevent special attention to the position of execution creditors under the Act, although this was an essential feature in *Re Boyle* and *Re Angus Thompson*. But both the learned Judges base their decisions on the ground that an unregistered conveyance is effectual to convey, and that the Territories Real Property Act does not make registration an essential and necessary requirement to the validity of conveyances of lands patented prior to 1st January, 1889. Mr. Justice McGuire, while resting his decision on this ground, does discuss the special principles applicable to the case of an execution creditor under the Act, as he also discusses the question of the construction that a Court of Equity might put on an unregistered conveyance—admitting that it was within the operation of section 59. It is obvious that these are questions apart from the construction to be placed on the special language of the statute, and all that is contended for here is that, under sections 4 and 59 of the statute, registration is made essential to the operation of every conveyance of land, whether patented before or after 1st January, 1887.

While it is proposed to leave the other questions referred to for a subsequent paper, there is an argument to be drawn from section 94, providing for the registration of executions, that has a direct bearing on the subject we are discussing. Of course, if it is admitted that, by an unregistered conveyance, the estate or interest of the execution debtor has been conveyed, so that he is no longer "owner" within the meaning of the Act, before the execution attached on the land, then clearly there is no estate or interest that can be bound thereby—no authority or argument is required to support this position— and *cadit quæstio*. But since the effect of an unregistered conveyance is exactly the point in issue, it is submitted that a careful consideration of section 94 furnishes a strong intrinsic argument against such a conveyance being effectual for the purpose.

It is not suggested in either *Re Boyle* or *Re Angus Thompson* that section 94 is confined in its operation "to land under the provisions of the Act"; nor is it suggested that the words "no land shall be bound by any such writ or other process, until such copy and memorandum have been so delivered" are of other than universal application to *all* lands in the Territories (*s*). Indeed, in *Re Boyle*, Mr. Justice Richardson expressly recognized the universal application of this section, by saying that had it not been for the conveyance in question, "there is no doubt but that the lands would be bound," *i.e.*, by the registered executions.

Now, it is impossible to read this section without being convinced that the only sort of transfer of an estate contemplated by it is a transfer by the Registrar under the Act: the machinery provided by the section for the protection of the execution creditor derives its whole force and effect from this view. The writ is to operate as a *caveat* against the *transfer* by the owner of the land; no *transfer* shall be made by him of such land, except subject to such writ. Now, "Transfer" is expressly defined by the interpretation clause as "the passing of any estate or interest in land *under this Act*, etc.," so that section 94 manifestly contemplates the bringing of the land under the Act, as a condition precedent to the "passing of any estate or interest." And, if it were not so, if any unrecorded conveyance were still of validity to pass the interest in land, would not the result be that the original owner, and his successors in title, by simply refusing ever to bring the land, voluntarily, "under the provisions of the Act," could for ever defeat the operation of any *fi. fa.* lands, at least so far as the operation of the writ depends upon section 94 of the Act?

Assuming, however, that an unregistered conveyance is effectual to transfer, etc., let us consider the practical result of this view of the T. R. P. Act.

(*s*) 51 Vict. cap. 20, provides, "And the Registrar shall thereupon, if the title has been registered, or so soon as the title has been registered under the provisions of this Act, enter a memorandum thereof in the Register."

Mr. Justice McGuire's very able reasoning brings out the conclusion that all lands, not actually brought under the Act by the operation of sections 44 or 45, are subject only to the rules of conveyancing as they exist in the Territories apart from the statute; and as it is assumed by the judgment that the old registry laws are abolished (as a matter of fact the ordinance of the N. W. Territories with regard to registration has been expressly annulled, as well as the provision for registry offices in the old N. W. T. Act), we have the curious result that while with regard to lands patented after the 1st January, 1887, the strictest and most rigid system of conveyancing is a *sine qua non*, with regard to lands patented before that date, it is entirely optional with the owner and his successors in title to come in under the new system, or to make use of common law conveyances, taking effect from delivery, without any necessity for registration, nor to preserve priority as against third parties. In fact, as long as the parties choose to refrain from coming in under the Act, not only is registration not essential, for any purpose whatever, but it is absolutely a physical impossibility.

It is hard to believe that this was the result intended by Territories R. P. Act, and it would seem proper, if possible, without straining the language of the Act, to give it a more reasonable, uniform construction. In construing any statute it always seems a satisfactory plan to go back to the primary canons, and ask ourselves what was the condition of the law before the statute, what was the evil at which it was directed, the remedy proposed by the statute, and its method of application.

We find then, that, previous to the statute, there was an excellent system of registration of deeds in force in the Territories, the essential feature of which was that the priority of the conveyance depended on the time of its *registration*, though registration was not essential to the validity of the instrument *inter partes*; and practically any estate recognized by the law of England might be the subject of the conveyance. For the purposes of this argument, it is sufficient to say that the supposed evils in this system,

against which the T. R. P. Act is directed, appear to be (1) Lack of uniformity in estates and tenures; (2) The length, obscurity, and expense of the actual instruments of conveyance; (3) The necessity on every change of ownership of searching through a mass of documents; (4) The absence of any authoritative certificate of title. To remedy these defects the Legislature proceeded to restrict the nature of estates and tenures, and to a great extent to obliterate the distinction between real and personal property; it abolished the old system of registration of *deeds*, and provided instead a registry of *title, preserving the principle of priority by date of registration*; it enables an owner of land to obtain a final and conclusive certificate of title, and provides simple forms of conveyances, and for the issue of a new certificate of title on every change of ownership. With regard to the owners of land patented after 1st January, 1889, this system is compulsory; with regard to the owners of lands patented prior to that date, it provides ample means to enable such owners to avail themselves of the new system. But it is quite clear that, if, when the old system of registration of deeds was abolished, it was left entirely optional with the owners of lands patented prior to 1st January, 1887, to convey, mortgage, and deal with their lands with complete indifference to the new system, the object of the Legislature would be very imperfectly effected by the Act. Instead of uniformity there would be utter diversity; instead of a simplication in titles there would be an utter absence of system; instead of an authoritative *certificate* of title, it would be impossible to obtain even an authoritative *abstract* of title; instead of the protection afforded by the principle of priority from registration, the door would be opened wide to all sorts of frauds and fraudulent conveyances; instead of improving on the system in force the statute would, in fact, with regard to all lands of this class, have permitted the most obsolete, unsystematic and expensive sort of conveyancing to prevail. Is it conceivable that the Legislature took no steps to prevent such an anomaly? Is it not possible so to construe the statute as to give full effect to the remedies it

proposes, not with regard to one class of land, but with regard to all land in the Territories? It is respectfully submitted that it is; and it is suggested that the method adopted by the Legislature was as follows:—To the owners of land patented prior to 1st January, 1889, the Legislature in effect says to landowners—"You have already got titles to your lands. It is entirely optional with you to avail yourselves of our new system, for the sake of having a certificate of title, or not—that is so far as you yourselves are concerned; but we cannot permit you to convey these lands away at your own will, and according to your individual whims and methods. There is one system of conveyancing which must be *universally* adopted. If you want to transfer your property, if you will look at section 59 of our Act, you will find that registration under the statute is essential to the validity of every conveyance. You say that you cannot register under the statute because you have no certificate of title. We have provided the means by which you can, and *must*, obtain a certificate of title, before your conveyance will be any good. If you will look at section 45 of the Act you will find that it exactly provides for your case. So you are at liberty to do as you please about the certificate in the meantime, but when you come to convey, you will have to register your title under section 45, and then register your transfer in accordance with the Act. That is what we mean by saying that all lands in the Territories shall be subject to the provisions of our statute."

C. C. McCAUL.

LETHBRIDGE, N. W. T.

EDITORIAL REVIEW.

Professional Discipline.

A recent well-known case, which arose out of an enquiry into the professional conduct of a member of our profession, is not calculated to inspire confidence in the Discipline Committee of the Law Society as a tribunal for the trial of complaints against barristers and solicitors. In the case in question the solicitor on trial was condemned in spite of all that was done and all that was left undone by the Committee, not because of it. Before the amendment to Law Society's Act giving the Benchers power to compel the attendance of witnesses and examine them upon oath, the enquiries were necessarily of a partial nature, such witnesses only being examined as might choose to attend. Notorious as this was, it is almost incredible that, after the amendment was made, the Discipline Committee should have conducted a whole enquiry of a serious nature without having administered an oath to any of the witnesses, and should have excused themselves by saying that they did not know they had the power.

To fall back, in that case, upon the admissions of the accused, not voluntarily made but extracted by questioning, was a resource designed to save the credit of the tribunal which condemned the accused, but is not a practice which can be said to be in the interest of even-handed justice as long as our law denies the right of compelling an accused person to give evidence. The position in which the accused is put is this—that if he answers, his answers may be taken against him; if he is silent, his silence will certainly be taken to his prejudice. The experience of those who have appeared on behalf of an accused person before the committee is sufficient testimony of this.

In another case the whole enquiry failed on account of the irregularity of attendance of the members of the Committee. Though a quorum was present at each meeting, the chairman was the only member who was continuously present at the enquiry and heard all the evidence. Notwithstanding this, the whole Discipline Committee agreed in a report to Convocation recommending striking off the Rolls. Upon the receipt of the report by Convocation it was contended on behalf of the accused that common justice had not been done to him, because the gentlemen who condemned him had not all heard the evidence, and consequently Convocation could not act upon their recommendation.

Such matters may of course be cured. The members of the Committee may be regularly summoned; the evidence, and all of it, may be regularly taken; the accused may not be asked to condemn himself or take the consequences; the members of the Discipline Committee may in future hear the evidence before passing sentence; the evidence may be taken according to the well known rules; and finally Convocation may be regularly summoned, and may act in strict accordance with the principles of justice—yet confidence in the tribunal has been shaken.

Even if confidence were restored, there are serious objections to the exercise of the powers now existing. Hitherto it has been the practice for the Benchers to receive a complaint of any nature against a Barrister or Solicitor from any source whatever, and upon receipt to refer it to the Discipline Committee to ascertain if a *prima facie* case has been made out. No evidence is taken by the Committee, but if the unsupported statements, perhaps the ravings, of the complainant show a good cause of complaint, the Committee report that a *prima facie* case has been made out, and Convocation then orders the enquiry to proceed before the Committee. Thus, without a word more than a complaint, a professional reputation is officially tainted. The injury is done before the enquiry is commenced.

It is of course necessary that the Society should have the means of purging itself of obnoxious members, but in our

estimation those powers should be restricted to cases which are not cognizable in Court, and to acting as complainant in Court when there is no client complaining. A summary jurisdiction over the members on matters of etiquette, which are the outward form and expression of a high code of honour, is essential to the life of the profession. An exercise of such jurisdiction even in minor matters would have a most healthful influence. Sensational advertising is a growing evil and not without a baneful effect upon the whole profession; here is ground for action; but though many instances are brought directly to the notice of the Benchers they pass without observation. They are matters which cannot be dealt with by the Court, while they could be dealt with by the Benchers; and on the other hand the matters which have been before the Benchers could have been dealt with much better in Court.

In addition, however, to matters of etiquette, important as they are in their place, there is another class of cases in which the Law Society might act with most beneficial effect, but not by enquiry before the Benchers. That, is in cases in which a solicitor can plead that the complainant has no *locus standi* in Court because he is not his client, and his client does not complain. Such cases can be dealt with by the Court only when the knowledge comes in the course of its judicial duties, in which cases the official solicitor is instructed. In cases of this kind, if the Law Society were empowered to act in the place of the client, those wrongful acts which escape judicial condemnation for technical reasons would be brought within reach of the Courts.

It cannot be denied, then, that up to the present time the result of exercising disciplinary matters has been unsatisfactory, and that the tribunal has not the confidence of the profession. But in order to reach offences which are either offences against etiquette only, or offences which cannot be judicially dealt with for want of a client, the Law Society should retain its disciplinary powers in order to deal with the former, and should be empowered to act as complainant or prosecutor whenever a case of miscon-

duct has been discovered and either the client will not complain or there is no client to lodge the complaint. In all matters of misconduct, and more especially of alleged misconduct, a solicitor should have the protection of the publicity, the rules of evidence, the decorum in procedure, and the advantage of silence, which are due as his natural heritage to the meanest criminal. He is further entitled to have the complaint laid with some degree of form and solemnity, and not as an unsupported complaint, perhaps a mere letter; and he is entitled to be indemnified for his costs and expenses if the charges fail. That all this can be better done in Court than before the Law Society goes without saying, and it behoves the Benchers themselves to seek the change.

BOOK REVIEWS.

A Treatise on the Law of Contracts, and upon defences to actions thereon; by JOSEPH CHITTY, JUN., ESQ. The twelfth edition newly arranged in 27 chapters, with much added matter, and increased facilities for reference. By J. M. LELY, ESQ., M.A., editor of "Woodfall's Law of Landlord and Tenant," etc., and NEVILLE GEARY, ESQ., M.A., author of the "Law of Theatres and Music Halls." London: Sweet & Maxwell, Limited. 1890.

The present edition of this book, which is the first after nine years, evidences a more scientific arrangement of the subject matter than the former editions, though it does not aim at as purely a scientific treatment as Pollock on Contract. It is a larger book, more adapted to the practical needs of the profession than to study merely. While the special divisions of the subject are not profusely illustrated, there is sufficient material to give a generous view of the particular branch, with references to specific works thereon. The editors, in their preface, suggest a number of matters upon which they think that legislation is wanted; amongst them, the law as expounded in *Foakes* v. *Beer*, which has already been dealt with by our Ontario remedial statute. The book is a valuable addition to the reference books on contracts.

An analysis of the ninth edition of Snell's Principle of Equity, with notes thereon. By E. E. BLYTH, LL.D., B.A., (Lond.), Solicitor, etc., etc. Third edition. London: Stevens & Haynes. 1889.

This is such a book as might be compiled by a student of Snell by the extraction of notes from the text in the course of reading. As a companion book to Snell's Equity it will be found useful to students.

A Digest of the Criminal Law of Canada.—(Crimes and Punishments) founded by permission on Sir James Fitz-James Stephen's Digest of the Criminal Law. By GEORGE WHEELOCK BURBIDGE, A.B., D.C.L., Judge of the Exchequer Court of Canada. Toronto: Carswell & Co. 1890.

Criminal Law as a substantive branch of jurisprudence is of comparatively modern growth. The early tendency of law-givers was to punish offences against the sovereign power by executive or legislative acts merely designed to meet the particular occasion which evoked them, while offences against individuals—such as homicide or theft—although endangering the public welfare, were treated as civil injuries to be requited by pecuniary damages. In the Roman Law, acts which are now regarded and punished by all civilized nations as crimes, were defined as *delicts* or wrongs, and instead of being corrected by the intervention of the state, were left to the prosecution of the injured parties, or their representatives. Hence the *corpus juris civilis*, which formed so rich a store-house to the nations of modern Europe in establishing their several systems of private rights and remedies, afforded no guidance to them in formulating laws for the repression of wrongs which menaced the security of the state. The first attempt to promulge a criminal code was the "Constitutio Criminalis Carolina" of the Emperor Charles V. of Germany, which was the forerunner of the present German penal code,—"*Strafgesetzbuch fur das Deutche Reich.*" It was not until 1810 that France adopted her *Code Pénal*, which afforded an exemplar long looked for by the Latin races of the continent, and which they were quick to profit by. Even so late as the year 1845, the criminal law of England was in so loose and unsatisfactory a state that an eminent legal author of that period was forced to admit that "no candid commentator could pronounce upon it a quite unmixed encomium." But there has been much accomplished in the way of legal reform since that time, and, as the utility and ethical significance of a code as applied to criminal law has now taken strong hold upon the minds of English lawyers, before very long we may expect to see a legislative

adoption of the Draft Penal Code which has been under the consideration of the Imperial Parliament for some time past.

In giving us a digest of the criminal law of Canada, based upon Sir J. F. Stephen's work of a similar character as applied to the criminal law of England, Mr. Justice Burbridge has made a most valuable addition to the scanty legal literature of Canada, and that both teachers and practitioners of the law will be quick to avail themselves of the release from much irksome research which is here afforded them, goes without saying. A digest is a systematised collection of laws, and only differs from a code in that it lacks legislative sanction and official promulgation. Only those who are obliged by their calling to ascertain the law by delving and toiling amongst the accumulated statutes and precedents of centuries can appreciate the value of such a work as the one under consideration.

The arrangement of Sir J. F. Stephen's Digest has been as closely followed by Mr. Justice Burbridge as circumstances would permit, and upon that head, as well as with regard to such portions of his book as literally reproduce the matter of the English work, little need be said. It is true that the method adopted by the English compiler of explaining the law by means of illustrations is open to the logical objection against argument by example, and it is moreover true that there is a case in the books where Lord Coleridge, C.J., shows that the learned Judge in one instance at least falls into a very obvious fallacy in endeavouring to settle a legal principle upon a dialectical basis. *Regina* v. *Ashwell*, 16 Q. B. D. at p. 224. Yet, in the main, the illustrations in his digest are sound in principle, and are found to be most helpful to a clear understanding of the law.

A cursory inspection of Mr. Justice Burbridge's work is sufficient to show that his labours have been far more comprehensive than those of an editor only. The scheme of his Digest carries him beyond the limit where the work of the English compiler furnishes him with a beaten path, and compels him to explore fields of colonial law hitherto

untrodden by commentators. It is a signal tribute to his learning and research that a thoughtful consideration of those portions of the book which are peculiarly his own impresses one with the conviction that they are comparable in a high degree with the matter contained in his English model. This is particularly true of the first chapter of the book. It deals with a subject of paramount importance to the law student, as well as to every practising lawyer in the country, "the application of the criminal law." This chapter is sub-divided into two articles treating of (1) the territorial application of the criminal law of Canada, and (2) the application of the criminal law of England in Canada. Although this chapter comprises only four and one-half pages of the book, yet within that limited space may be found, in text and foot-note, an exhaustive exposition of all the sources of law relating to crimes and punishments now in force in the several Provinces of the Dominion, whether by importation from the Mother Country at the time of conquest or settlement, or by subsequent Imperial, Provincial, or Federal Parliamentary enactment. This speaks well for the power of condensation of the learned author.

Again, there are instances in abundance where our own criminal statute law is wholly different from that of England, and in dealing with them the learned Judge's work is, of course, entirely original, except in point of arrangement, which is uniform throughout. The copious foot-notes to the text, printed in minion, are most useful epitomes of all the important decisions of our Courts bearing upon the interpretation of the statutes here referred to, and will be duly appreciated by those who have recourse to them.

Besides these estimable features of the book, wherever the learned Judge has adopted the text and notes of the English author he has added notes of his own which greatly enhance the value of the original matter. The index and tables of cases and statutes have been carefully prepared by Mr. Charles H. Masters, assistant reporter to the Supreme Court of Canada, a gentleman of experience

in this department of book-making, and who recently performed a similar service for Mr. Justice Taschereau in the preparation of the 2nd edition of his well-known compilation of the Criminal Acts.

Space has only permitted me to barely indicate what seem to me the salient features of a work which I venture to aver has few equals among the publications heretofore issued by Canadian lawyers. By its arrangement it is so well qualified for the purposes of the student that it must certainly become a text-book in our law schools; and it should have a ready sale amongst the profession generally, as no library will be complete without so valuable a compendium.

C. M.

REVIEW OF EXCHANGES.

Albany Law Journal.—23rd November, 1889.

Some Old Scotch Laws, by R. V. R. A collection of curious old Scottish statutes, chiefly sumptuary.

Ibid.—18th January, 1890.

Law and Doctors in New York, by CHARLES Z. LINCOLN. Concluded in the following number. Refers to the New York Statutes affecting physicians.

Ibid.—8th February, 1890.

Validity of a Grant to Exercise an Exclusive Franchise to use the Streets of a Municipality, by W. W. THORNTON. The authorities was against the power to give an exclusive right even for a limited period. The Ontario Municipal Act forbids municipalities to create monopolies in any business except ferries.

Central Law Journal.—20th September, 1889.

Negotiability of Instruments containing stipulations for the payment of attorney's fees and costs of collection, by JAMES A. MITCHELL. Cites American Statutes and cases.

Ibid.—27th September, 1889.

Priority in the Record of deeds, by B. R. WEBB. This article discusses the principle of the American Statutes giving priority of registration effect to establish a deed.

Ibid.—4th October, 1889.

Declaration of express trusts and admissibility of parol evidence to explain defective declarations, by EUGENE MCQUILLIN. The effect of the Statute of Frauds as to manifesting and proving a trust by writing, and of those American Statutes which have been founded upon it is first shown. The learned writer then proceeds to show in what cases parol evidence is admitted to explain defective declarations. Many English and American cases are cited.

Ibid.—11th October, 1889.

Hawkers and Peddlers, by FRANK H. BOWLBY. A hawker is one who cries his wares in the street instead of selling from a shop. A peddler is primarily one who travels on foot from place to place to sell; but there is no real difference in law. They are usually subject to restrictions, and such laws are constitutional. A single act of selling does

not constitute a man a hawker, nor is one a hawker who sells by sample, though a license be required. Sales without a license are valid and may be enforced; yet the hawker is liable to the penalty.

Ibid.—18th October, 1889.

Public Policy in the Law of Contracts, by DAVID PLESSNER. Whether a contract is against public policy is a question of law for the Court, and its tendency at the time it was made is to determine its validity. Instances are given of contracts which contravene public rights and interests.

Ibid.—25th October, 1889.

Trustees and cestuis que trust as Parties, by JOHN H. GILLETT. American cases on practice are cited.

Ibid.—1st November, 1889.

Limitations on Municipal Indebtedness, by J. R. BERRYMAN. Concluded in the following number. The constitutional limitations of the right of municipalities to incur debts are cited and illustrated by cases on the subject.

Ibid.—15th November, 1889.

Duty of Prosecutor to Prove the Res Gestae, by D. R. N. BLACKBURN. In criminal prosecutions the rule is that the prosecuting counsel should give all the available evidence concerning the fact before the prisoner is put upon his defence, and so the *res gestæ* must be given in evidence.

Ibid.—22nd November, 1889.

Foreign Bankrupt and Insolvent Laws, by JAMES M. KERR. The effect of such laws is discussed with reference to foreign assignees and assignments, and the effect upon real estate, choses in action, property *in transitu* and ships at sea.

Ibid.—29th November, 1889.

Liability of a Municipality for Injuries Inflicted by Falling Objects, by W. W. THORNTON. One line of cases shows that awnings, flag poles, etc., upon streets under the jurisdiction of a municipality are as much subject to regulation as the surface of the street, and if injury occurs owing to their unsafe condition the municipality will be liable. Another line is cited from which it appears that the falling of signs, etc., occasioning damage does not render the municipality liable. But still a third shows that unsafe walls which the municipality had jurisdiction to raze, facing the street but not thereon, occasioned liability by falling and inflicting injury.

THE

CANADIAN LAW TIMES.

MAY, 1890.

DEVOLUTION OF ESTATES ACT: ADMINISTRATION OF ASSETS.

THE Devolution of Estates Act, R. S. O. c. 108, has effected several important changes in the rules governing the order of administration of assets, and it has become necessary, in order to adapt them to the law in Ontario, to re-construct the table as found in English text-books.

Up to the passing of the Devolution of Estates Act the following was the order:

1. The general personal estate not bequeathed at all, or by way of residue only.

2. Real estate devised in trust to pay debts.

3. Real estate descended to the heir and not charged with the payment of debts.

4. Real or personal estate charged with the payment of debts, and (as to realty) devised specifically or by way of residue, or suffered, by reason of lapsed devise, to descend, or (as to personalty) specifically bequeathed, subject to that charge.

5. General pecuniary legacies, including annuities and demonstrative legacies which have become general.

6. Specific legacies (including demonstrative legacies that so remain), specific devises and residuary devises not charged with debts.

7. Real or personal estate subject to a general power of appointment which has been actually exercised by deed (in favour of volunteers) or by will.

8. Paraphernalia of widow.

The two sections of the Devolution of Estates Act which affect this table are the fourth (sub-sec. 1) and the seventh. Sub-sec. 1 of section four enacts that,

"All such property as aforesaid (*i.e.* real and personal as in section 3) which is vested in any person, or is comprised in any such disposition as aforesaid made by him, shall on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and *subject to the payment of his debts*; and so far as the said property is not disposed of by deed, will, contract or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed."

Section seven provides that,

"The real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto) *be applicable ratably*, according to their respective values, to the payment of his debts."

By sub-section one of section four the property in No. 3 of above table is placed in No. 1, since it becomes liable for payment of debts equally with personal property, and personal property, according to the well known rule, is the primary and natural fund for the payment of debts.

By section seven the property comprised in No. 4 and described as "real estate charged with the payment of debts and devised by way of residue, subject to that charge," is placed in No. 1; and by the same section the property in No. 6 and described as "residuary devises not charged with debts," is placed in No. 1.

By the latter part of sub-section one of section four, the property comprised in No. 4 and described as "real estate charged with the payment of debts and by reason of lapsed devise suffered to descend subject to that charge," is placed in No. 1.

So that the table now stands;

1. The general real and personal estate not devised or bequeathed at all, or devised or bequeathed by way of residue

only, whether charged or not with payment of debts; and real estate charged with the payment of debts, and by reason of lapsed devise suffered to descend subject to that charge.

2. Real estate devised in trust to pay debts.

3. Real and personal estate devised or bequeathed specifically charged with the payment of debts.

4. General pecuniary legacies, including annuities and demonstrative legacies which have become general.

5. Specific legacies (including demonstrative legacies that so remain) and specific devises, not charged with debts.

6. Real or personal estate subject to a general power of appointment which has been actually exercised by deed (in favour of volunteers), or by will.

7. Paraphernalia of widow.

At first sight it might seem that No. 2 should be included in No. 1; but when we bear in mind that the old rule that the personal estate not bequeathed at all, or by way of residue only, constitutes the primary and natural fund for the payment of debts, still holds except so far only as modified by the statute, we see that property in No. 2 is not affected by either of the sections cited above. The expression "subject to the payment of his debts" in the first part of sub- section one of section four, does not alter the order of application, but means that in so far as the creditors of the deceased are concerned the property is to devolve subject to the payment of his debts, but that except in so far as expressly altered by the Act, the order of administration of assets is not to be affected.

If the residuary legatee is also the residuary devisee it matters not whether the debts be paid out of the residuary estate or out of the real estate devised for the payment of debts, unless, indeed, such real estate be devised to some person other than the residuary devisee in the event of its not being required for the payment of debts. Where the residuary devisee and the residuary legatee are different persons, it becomes important to know whether real estate devised for the payment of debts is applied along with or

after real and personal estate not disposed of or by way of residue only.

The following figures may be taken by way of illustration.

1. Value of residuary real estate	$ 200.00
2. Value of residuary personal estate	2000.00
3. Value of real estate devised for payment of debts	3800.00
	6000.00

And suppose debts amount to $2000.00, *i. e.*, one third of above amount.

(1) If 1, 2, 3 are liable ratably,

$ 66.67 must be paid out of residuary real estate leaving...	$ 133.33
$ 666.66 must be paid out of residuary personal estate leaving...	1333.34
$1266.67 must be paid out of real estate devised for payment of debts leaving	2533.33
$2000.00	$4000.00

In this case the residuary devisee gets $133.33 + $2533.33, total, $2666.66.

And the residuary legatee gets $1333.34.

(2) If 3 is not to be applied till after 1 & 2, then

$ 181.82 must be paid out of residuary real estate leaving	$ 18.18
$1818.18 must be paid out of residuary personal estate leaving...	$ 181.82
$2000.00	

In this case the residuary legatee gets $181.82.

And the residuary devisee gets $18.18 + $3800.00, total, $3818.18.

It might be contended that inasmuch as the real estate in this case devised for the payment of debts would not be required for that purpose, it becomes a residue, and so section seven applies and makes it liable ratably with the residuary personal estate. But this liability can only arise after the debts are paid, as until then it clearly cannot be considered as "real property comprised in any residuary

devise," and, moreover, in the will itself it is devised specifically and not by way of residue.

Although *donationes mortis causa* are not often objects of litigation, it is interesting to note that they are not provided for in the above table. They are of the nature of legacies in that they are liable for the debts of the deceased upon a deficiency of assets (*a*), and as they are also in their nature specific, it would seem that they are liable along with specific devises and bequests not charged with debts.

In *Mason* v. *Mason* (*b*) it was argued that the Devolution of Estates Act practically repealed what is usually styled Locke King's Act (R. S. O. cap. 109, sec. 37), but the Chancellor held that the two Acts must be read together and that the latter has not been superseded.

JAS. EDMUND JONES.

TORONTO.

(*a*) *Smith* v. *Casen*, cited in 1 P. Wms. 406.
(*b*) 13 O. R. 725.

ASPECTS AND PHASES OF THE LAW.

A Quaint Ceremony.

The interesting survival of a byegone age is the custom of holding an annual Manor Court, as recently occurred in a small village near a populous town in Yorkshire, England. The manor was formerly in the possession of the Knights Templars, and at their dissolution passed into lay hands. Of course, this was not the only manor held by the Templars; they had others, but all were distinguished by by the small iron cross, the Templars' symbol. The Court, as usually held in the village referred to, comprised the ancient Court Leet or Villeins' Court, the Court Baron or Court of the Freemen of the Manor, and the View of Frankpledge, an ancient arrangement for combining the population into groups of ten, who stood bail for one another's appearance in case they were wanted before the Shiremoot to be tried for the commission of any crime. In former days the open mound or the leafy shade was the place where the Court sat and the crowd of tenants thronged, now it is the village inn which is utilized for the purpose, with but a scanty array of tenants. To the Court is attached a bailiff, whose duties are to summon a jury, collect the fines, and act generally as the official of the Manor Court. In connection with the sittings of the Court a jury has to be formed, and they have in their turn to choose a foreman. If any juryman is absent when called on, he incurs a penalty of five shillings. When the jury is settled the bailiff makes proclamation by crying aloud:—"Oh yes! Oh yes! Oh yes! All manner of persons who have been warned to appear here, this day, or who owe any suit or service at the Court Leet, View of Frankpledge or Court Baron of the Honourable ———, lord of this manor, come forth and do your suit, and all officers and others answer to your names and save your fines." The foreman of the jury is then sworn, the steward or his representative addressing him thus:—"You shall swear that you, the foreman of this jury, with your fellows, will diligently

enquire and true presentment make of all such matters and things as shall be given you in charge, or otherwise come to your knowledge concerning the Queen or the lord and tenants of this manor. The Queen's counsel, your own and your fellows' you shall keep secret and undisclosed. You shall not conceal or hide anything, or spare anyone from favour, fear, promise or affection, or present any person or thing for hatred, envy, or malice, but shall make and deliver a true verdict without concealment to the best of your knowledge and the information you shall receive. So help you, God." The other members of the jury being sworn, the proceedings commence.

The steward of the manor reads a list of the copyhold tenants, and the jury, during the process of the reading, have to state whether the tenant is yet alive, or if he is dead, who the present holder is. In the event of any death and the consequent change of holder, either under a will or by inheritance, the lord is entitled to claim two years' value of the holding, or in case of a sale only, then to one and a half year's value. At the present day the payment of these fines is made out of Court, the list being merely read in order to assure the steward that no changes of tenancy have been made unauthorized by him.

In a similar way the list of residents in the manor is then read, due inquiry being made whether each person has paid the sum due to the lord on settling in their holding. Each new holder has to take the following oath:—"I, A. B., swear to be faithful and fealty bear to the lord of the manor for the lands and tenements to which I am now admitted, and that I claim to hold of him. I will from time to time pay, perform and do the rents, customs and services thereof due and accustomed at the times assigned." The surrender is often made by a straw attached to the document. Amongst other business that has to be transacted is the election of two or more by-lawmen, whose duty it is to look after the roads. These are elected by the Court, and if there is a surplus of candidates the matter is settled by a show of hands. Each new person so appointed has to pay a fine for the honour of serving.

Sometimes the approach of the dinner hour necessitates the solemn adjournment of the business of the Court to some fixed time in the afternoon, when any further matters are attended to, and when everything is completed the Court is closed by proclamation until the next summons, the proceedings being wound up by drinking the healths of the Queen and of the lord of the manor.

This is not the only quaint ceremony still surviving in the Old Country, but the number is fast decreasing, and when the twentieth century dawns not one may be left. Still they served their purpose, and that is sufficient.

Building Regulations of Former Days.

Sumptuary and regulative laws for the conduct of building are of very ancient date, and must have been co-eval with the foundation of cities. Plato extols the service and almost attributes the origin of law to architecture, as following, of course, the establishment of communities. The laws of Lycurgus regulated the building of Lacedæmon and prescribed rules to the Spartan architects, as did the public laws of Rome in their earliest days to those of its magnificent city. Vitruvius and Plutarch both allude to such. The ancient laws of the twelve tables legislate for buildings, and Justinian provides for the erection, maintenance and support of houses, temples, baths, churches and other public and private edifices; as do our earliest English laws, constitutions, canons, etc., from the time of Alfred the Great to the present day. Cicero in contemplating the laws of the Romans compared them with their riches and declared that they exhibited as great wisdom in framing their laws as they did in accumulating the infinite wealth the State enjoyed in his time; and Sulpitius affirms *duo sunt quibus extulit ingens Roma caput, virtus belli, et sapientia pacis*, that it was their wise government in peace that so highly advanced their State. Plato avers that architecture by the building of cities opened the path to the study of politics and legislature. Herodotus records that a hundred thousand workmen were employed upon one of the pyramids alone, but Diodorous and Pliny three

hundred and sixty thousand, which, whatever the correct number was, nevertheless, shows the perfection to which the architecture of Egypt had arrived, and that such works could not have been erected without laws for the regulation and preservation of buildings.

Moses in his code of Israelitish laws legislated for the Jewish builders as appears from Deuteronomy: "When thou buildest a new house, then shalt thou make a battlement for thy roof, that thou bring not blood upon thine house if any man fall from thence." The Chinese, too, have some remarkable laws on the subject of architecture, which prescribe with much minuteness the exact way in which a *lon* or place of a prince of the imperial family is to be built, how those of the grandees of the empire of the mandarins, the public edifices of the capital, of provincial towns and cities according to their several ranks or grades, are to be constructed, and each of these laws contains enactments and regulations as precise as a building act of parliament. They direct the number of courts, the dimensions of terraces, the lengths of the buildings, and the heights of the roofs of every class of the community, whether the occupier be a citizen, a man of letters, a mandarin, a prince or an emperor.

As regards England the *leges et consuetudines architecturæ* are scattered about in various enactments and regulations, being contained in the common, the statute, the civil and the ecclesiastical laws of the realm. The ecclesiastical law is formed of four principal elements, that is to say the civil law, the canon law, the common law and the statute law, and when these interfere with each other, the civil law gives place to the canon law, both of these to the common law, and all three to the statute law.

The Poets' Lawyers.

First and foremost amongst the lawyers who have been dealt with by the poets may be mentioned the sergeant-at-law introduced to us by Chaucer, thus:

> A Sergeant of the law, 'ware and wise,
> That often had been at the Parise

There was also, full rich of excellence.
Discreet he was and of great reverence;
He seemed such his words were so wise:
Justice he was full often in assize,
By patent and by pleine commissioun
For his science, and for his high renown,
Of fees and robes had he many a one.
So great a purchaser was no where none.
All was fee simple to him in effect,
His purchasing might not be in suspect
No where so busy a man as he there n'as,
And yet he seemed busier than he was,
In termes had he case and doomes all,
That from the time King Will weren fall.
Thereto he could indite, could make a thing
That coulde no wight pinch at his writing;
And every statute could be plain by rote,
He rode but home in a medley coat,
Girt with a seint of silk with barres small.

Truly a quaint picture of an old world lawyer, and such an one, as we could imagine, following faithfully the precepts of the law as laid down by Justinian, *honeste vivere, alterum non lædere, suumquique tribuere.*

Another legal personage is mentioned by Chaucer, that is, the manciple derived from the Latin word *manceps*. He was not in any sense a lawyer, but may be said to have savoured of the law, being the officer of the old inns of court whose duty it was to purchase their provisions. He and his office are thus described in the Canterbury Tales:

A gentle manciple was there of a temple;
Of which achatours mighten take ensample
For to be wise in buying of vitaille;
For whether that he paid, or took by taille,
Algate he waited so in his achate,
That he was aye before in good estate.
Now is not that of God a full fair grace,
That such a lewed manne's writ shall pace
The wisdom of a heap of learned men?
Of masters had he more than thries ten
That were of law expert and curious,
Of which there was a dozen in that house,
Worthy to be stewardes of rent and land
Of any lord that is in Engle-land.
To maken him live by his proper good,
In honor debteless but if he wood;
Or live as scarcely as him list desire,

An able for to helpen all a shire,
In any case that mighte fall or hap,
And yet this manciple set their alter cap.

In other words this manciple was one of whom purchasers (achatours) might take example, for when buying, whether he paid, or took on credit (by taille), he always obtained a good bargain, and this unlearned (lewed) man was enabled thereby, and by his wit, to surpass (pace) the wisdom of a heap of learned men, his masters expert and curious in the law though they were.

Turning from these old world lawyers, let us take a great stride forward both in time and space, leaving the fourteenth century behind us, and coming to the nineteenth, and stepping from the continent of Europe into that of America, and learning what that world-famous poet Longfellow has to say anent lawyers. In his melodious poem of "Evangeline" we find mention made of a worthy notary by name René Leblanc. The poet's description of him is exceedingly well drawn, thus:

Bent like a labouring oar, that toils in the surf of the ocean,
Bent, but not broken, by age was the form of the notary public;
Shocks of yellow hairs, like the silken floss of the maize hung
Over his shoulders; his forehead was high, and glasses with hornbows
Sat astride on his nose, with a look of wisdom supernal.

The notary seems to have led a most diversified life but as it was not connected with legal matters, it is not necessary to depict it more fully here. The object of René Leblanc's visit to Evangeline's father was to arrange the marriage settlement of the maiden. After much conversation, argument, and relation of incidents of past life, the lamp is lit, and the tankard filled preparatory to signing the settlement,

While from his pocket the notary drew his papers and ink horn,
Wrote with a steady hand the date and age of the parties,
Naming the dower of the bride in flocks of sheep and in cattle.
Orderly all things proceeded, and duly and well were completed,
And the great seal of the law was set like a sun in the margin.

The business completed, Evangeline's father gives the notary thrice his usual fee, and the lawyer departs.

Then from his leathern pouch, the farmer threw on the table
Three times the old man's fee in solid pieces of silver,

And the notary rising and blessing the bride and the bridegroom
Lifted aloft the tankard of ale and drank to their welfare,
Wiping the foam from his lip he solemly bowed and departed.

An English poet, Arthur Hugh Clough, has stretched in his poem "Mari Magno or Tales on Board" an excellent portrait of a member of the legal profession:

My guardian friend was now, at thirty three,
A rising lawyer—ever, at the best,
Slow rises worth in lawyers gown compressed;
Succeeding now, yet just, and only just,
His new success he never seemed to trust.
By nature he to gentlest thought inclined,
To most severe had disciplined his mind;
He held it duty to be half unkind.
Bitter, they said, who but the exterior knew
In friendship never was a friend so true:
The unwelcome fact he did not shrink to tell,
The good, if fact, he recognised as well.
Stout to maintain, if not the first to see;
In conversation who so great as he?
Leading but seldom, always sure to guide,
To false or silly, if 'twas borne aside,
His quick correction silent he expressed,
And stopped you short, and forced you to your best.
Often, I think, he suffered from some pain
Of mind that on the body worked again;
One felt it in his sort of half disdain,
Impatient not, but acrid in his speech:
The world with him her lesson failed to teach
To take things easily and let them go.

In strong contrast to this description of a legal gentleman an amusing account is given by Sir Alexander Boswell (eldest son of Johnson's Boswell) in a short poem, "Jenny's Bawbee," this word "Bawbee" meaning "money." There were four chaps after Jenny's money, amongst others a lawyer.

A lawyer neist, wi' blethern' gab,
Wha speeches wove like ony wab,
In ilk ane's corn aye took a dab,
And a' for a fee:
Accounts he had through a' the town,
And tradesmen's tongues nae mair could drown
Haith now he thought to clout his gown
Wi' Jenny's bawbee.

The way in which Jenny got rid of her four suitors was characteristic.

She bade the laird gang comb his wig,
The sodger no to strut so big,
The lawyer no to be a prig;
The fool cried "Tehee,
I kent that I could never fail!"—
She preen'd the dish clout till his tail,
And cooled him wi' a water pail,
And kept her bawbee.

In Hudibras that exquisitely humorous poem of the seventeenth century, full of learning and wit, lawyers are stated to be no disputants in their profession, and to be exempt from interlopers.

For law's the wisdom of all ages,
And manag'd by the ablest sages;
Who, though their bus'ness at the bar
Be but a kind of civil war,
In which th' engage with fiercer dudgeons
Than e'er the Grecian did and Trojans,
They never manage the contest
T' impair their public interest,
Or by their controversies lessen
The dignity of their profession:
Not like as brethren who divide
Our commonwealth, the cause, and side;
And though w' are all as near of kindred
As th' outward man is to the inward,
We agree in nothing, but to wrangle
About the slightest fingle fangle;
While lawyers have more sober sense
Than to argue at their own expense,
But make their best advantages
Of others' quarrels like the Swiss;
And out of foreign controversies,
By aiding both sides, fill their purses;
But have not interest in the cause
For which th' engage and wage the laws
Nor farther prospect than their pay,
Whether they lose or win the day:
And though they abounded in all ages,
With sundry learned clerks and sages,
Though all their business be dispute,
Which way they canvass every suit,
Th' have no disputes about their art,
Nor in Polemics controvert,
While all professions else are found,

With nothing but disputes t' abound:
But lawyers are too wise a nation
T' expose their trade to disputation,
Or make the busy rabble judges
Of all their secret piques and grudges;
In which, whoever wins the day,
The whole profession's sure to pay.
Besides no mountebanks, nor cheats,
Dare undertake to do their feats:
When in all other sciences
They swarm like insects and increase.
For what bigot durst ever draw,
By inward light, a deed in law?
Or could hold forth, by revelation,
An answer to a declaration?
For those that meddle with their tools
Will cut their fingers if they're fools.

And then the poem goes on to describe how Hudibras consulted his lawyer or counsellor as he termed him. The nature of this advice may be gathered from the closing lines of the interview, with which we shall also conclude our quotation from "Hudibras."

I would not give, quoth Hudibras,
A straw to understand a case,
Without the admirable skill
To wind and manage it at will;
To veer, and tack, and steer a cause
Against the weather gage of laws,
And ring the changes upon cases
As plain as noses upon faces,
As you have well instructed me,
For which you've earned (here 'tis) your fee.
I long to practise your advice,
And try this subtle artifice;
To bail a letter as you bid;
As not long after thus he did.

It seems that the poet Cowper was intended for the law, and spent part of his time in a solicitor's office and in the chambers of a barrister. Whilst studying in the latter place he became acquainted with Thurlow, the future Lord Chancellor. Instead, however, of spending their time in steadily pursuing their studies, these two were constantly employed from morning to night "in giggling and making giggle."

These few notes cannot claim to be a full exposition of everything the poets here said anent lawyers, but such as they are, they indicate to what an extent the legal profession has been scanned by other eyes than those of its professors.

The Ethics of Law and Accountancy.

Looked at from an objective aspect the law does not seem much favoured ethically, for even though "Law is said to be the perfection of reason" irreverent laymen assert that this charming theoretical description often belies experience, and is more an ironical epigram than anything else. How, it is asked, can the law be perfect when it is so uncertain, evidenced by the varying interpretations of the statutes and the opposing dicta of the advocates before the judges? Laymen, however, forget that the laws of the land are made by their representatives in the Houses of Parliament, and not by the lawyers, to whom is left the task of interpreting the too often clumsy efforts of these representatives to make good law. As regards the opposing dicta of the advocates it is clear that if the litigant parties cannot agree themselves on the points in dispute without the aid of the law, why when the matter comes up for argument and judicial decision, their advocates must endeavour to follow the maxim *id certum est quod certum reddi potest* (that is certain which can be made certain). A satirical saying in connection with lawyers is that "their first effort is to get *on*, their second to get *honour*, and their third to get *honest*."

Other professions cannot, however, claim to be much better regarded by the public, for it has been said that in days gone by accountants were stigmatized as commercial vultures owing to their exorbitant method of charging for their work, and by assisting in the process known as "wrecking" in order to make work. It was averred in those days, that this class of people flourished most when carcases were plentiful, and, of course, their gain meant other people's loss. However, "other times, other manners," and the accountants of the present generation are a more

honourable and trustworthy body of men than their brethren of times past.

A lawyer's duty has been well and clearly defined to be "to right the wrong" and to keep what is right from getting wrong. The necessity of being always on the alert in order to successfully and properly carry out this duty requires the cultivation of the spirit of criticism and distrust, but it should always be remembered that the law presumes every man to be innocent until the contrary is proved. How manifold are the instances in which confidence is reposed in a legal adviser with the greatest satisfaction to the client is clearly indicated by the law reports.

The accountants while claiming the law as their "august ally" at the same time consider that one of the highest functions of accountancy is to prevent litigation; and that looking at the "envy, hatred, malice and all uncharitableness" often associated with disputes at law—even in cases where justice and not merely the longest purse is triumphant—it is a matter of profound satisfaction that by exhibiting the inexorable logic of figures properly stated the number of such disputes can be reduced, and the practical injunction of christian ethics: "As much as lieth in you, live peaceably with all men," be more fully obeyed. Akin to the prevention of litigation is the *prevention of dishonesty*, as distinct from detection, instanced by the auditing of books, the preparation of balance sheets, profit and loss accounts and so on. Books of account, however, it should not be forgotten can be falsified, and where the accountant fails to discover this, or is himself the author of the fraud, the law will step in and adjudge due punishment.

At a meeting in London some time ago it was claimed that an accountant was one of the most conscientious and best all round men in the community, and that the ethics of the profession tended to make him so. In his avocation there were few talents or good qualities which could not find free scope and a congenial sphere, and that whereas at one time accountancy was a sort of *omnium gatherum* or refuge for any body who had failed in other avocations, it

now offers but little room or prospect for men of inferior ability. Accountants were urged to raise the standard of their profession still higher and to act in the spirit of the old Latin proverb, *Qui cessat esse melior, cessat esse bonus* (who ceases to be better, ceases to be good).

These dissertations have thus far shown some remarkable peculiarities on the part of the two professions discussed. With regard to the etiquette of the legal profession, that unwritten code which regulates the relation of lawyers to each other as such, it has been well pointed out, that although the spirit of competition and motives of self-interest can never be entirely excluded from any business or profession, yet there should be further development of that *esprit de corps* and that courteous consideration for the feelings and interests of others which will lead us to think of our fellow-members as "brethren" rather than "rivals." One way of attaining this higher tone is by the holding of meetings, weekly, monthly or yearly, which likewise aid in promoting good fellowship and mutual acquaintance and esteem, and in raising the standard of professional etiquette and dignity. The obligations imposed on the legal profession by professional etiquette have been neatly summed up in the motto: *Noblesse oblige.*

Diverting tales could be told about the results of being too strict in matters of etiquette, but this strictness sometimes works a hardship, and when such is likely to happen, a little more liberty should be allowed. Still the law is not the greatest sinner in this respect, as the medical profession likes to mount the stilts, often with disastrous results to patients.

Divorce amongst the Hebrews and Romans.

As in the present day so in former times was the aid of a lawyer required on the marriage or divorce of a woman. Amongst the ancient Hebrews, at the time of the marriage, it was the custom of the man to give his wife a dowry bill, whereby he endowed her if she was a virgin with two hundred deniers (that is fifty shekels), or if she had married before, then she only received one hundred deniers (*i. e.*,

twenty-five shekels). This was called the root or principal of the dowry, and might be more but never less. The contract was usually drawn up by a scrivener, but sometimes by the woman's father, as in the case of the contract between Tobias and Sara, which was performed by Kaguel, the father of the bride.

In the Babylon Talmud is given a copy of a dowry bill which, as contrasted with modern marriage settlements, may be worth giving. It runs thus :—"Upon the sixth day of the week, the fourth of the month Sivan, in the year five thousand two hundred and fifty-four of the creation of the world, according to the computation which we use here at Massilia, a city which is situate near the sea shore, the bridegroom Rabbi Moses, the son of Rabbi Jehuda, said unto the bridewife Clarona, the daughter of Rabbi David, the son of Rabbi Moses, a citizen of Lisbon: Be unto me a wife according to the law of Moses and Israel, and I according to the word of God, will worship, honour, maintain, and govern thee, according to the manner of the husbands among the Jews, which do worship, honour, maintain, and govern their wives faithfully. I also do bestow upon thee the dowry of thy virginity, two hundred deniers in silver which belong unto thee by the law; and moreover, thy food, thy apparel and sufficient necessaries, as likewise the knowledge of thee, according to the custom of all the earth" In this way, therefore, did Clarona, the virgin become a wife to Rabbi Moses the son of Jehuda the bridegroom.

The husband and wife amongst the ancient Hebrews did not always agree, and in such a case a bill of divorce was permitted. This bill was called by the Hebrews Sepher Kerithuth, a bill of cutting off, inasmuch as the woman by this means was cut off from her husband's family. Ten things, however, were requisite in order to provide the foundation for a divorce—or as they were sometimes called the root of a divorce. These requisites were: 1. That a man put not his wife away but of his own will. 2. That he put her away by writing, not by any other thing. 3. That the matter of the writing be to divorce her, and

put her away out of possession. 4. That the matter of that divorcement be between him and her. 5. That it be written by her name. 6. That there be no action wanting, after the writing thereof, save the delivery of it unto her. 7. That he give it unto her. 8. That he give it her before witnesses. 9. That he give it her by the law of divorce. 10. That it be the husband or his deputy that delivers it unto her. The bill of divorce which was drawn by a scrivener or public notary was in the following form:— "Upon such a day of the week, such and such of the month N., such or such an year of the creation of the world, according to the computation which we use here in this city N., situate near the river N., that I, of the country of N., the son of Rabbi N., of the country N. But now I, dwelling in such and such a place, near such or such a river, have desired of my own free will, without any co-action, and have divorced, dismissed, and cast out thee, thee I say, thee my wife N., of the country of N., the daughter of Rabbi N., dwelling in such or such a country, and dwelling now in such or such a place, situate near such or such a river, which hast been my wife heretofore; but now I do divorce thee, dismiss thee, and cast thee out, that thou mayest be free, and have the rule of thyself, to depart and to marry with any other man whom thou wilt; and let no man be refused by thee for me, from this day forward for ever. Thus be thou lawful for any man, and this shall be to thee from me, a bill of separation, a bill of divorce, and a letter of dismission. According to the law of Moses and Israel. N., the son of N., witness. N., the son of N., witness." Such was the form of the bill of divorce which apparently required two witnesses. It was not lawful for a woman who had been divorced to marry again, until ninety days had elapsed since the day of her divorce; and the same period of time after her husband's death must intervene in the case of a widow before she marry again. The object of this duration was that in order that it might be known whether if a child was born during that period, it was the issue of the first or second husband.

Amongst the Romans, too, the custom of divorce was

quite usual, even for the women to divorce their husbands, and to marry again at pleasure. Juvenal refers to this custom in the lines: *Sic fiunt octo mariti Quinque per autumnos*; and Martial also: *Et nubet decimo jam Thelesina viro.* When, however, a bill of divorce was tendered by a woman it was termed "letters of forsaking" and not "letters of cutting off, or putting away" as when the bill was presented by a man. Although the laws of the world did not forbid marriages between divorced persons and others, yet they were condemned by divorce law and persons marrying after a divorce were reputed *digamites*, that is, having two husbands or two wives. In the case, however, of a husband's or wife's death, then the second marriage of either of the parties surviving was not forbidden by Scripture, nor by heathens either, for Horace said: "*Unico gaudens mulier marito.*"

THOS. F. UTTLEY.

MANCHESTER, ENGLAND.

BOOK REVIEWS.

A Treatise on the Law and Practice relating to Infants. By ARCHIBALD H. SIMPSON, M.A., of Lincoln's Inn, Barrister-at-Law, and Fellow of Christ's College, Cambridge. Second edition, by EDGAR J. ELGOOD, B.C.L., M.A., of Lincoln's Inn, Barrister-at-Law, formerly scholar of Exeter College, Oxford, joint author of "The Law relating to the administration of the estates of deceased persons," etc. London: Stevens & Haynes. 1890.

This is one of the text-books to which we always feel confident that we can turn with safety and reliance, and one that we can cite to the Court without being asked whether the author refers to any authority for what he states. Not that Mr. Simpson himself is an authority, as we understand the term, but that he is reliable; for many good books are spoiled by careless citations. Many decisions respecting infants have accumulated since the first edition appeared in 1875, and we here get the advantage of them. And the statutes passed since that date are fully dealt with.

REVIEW OF EXCHANGES.

American Law Review.—September-October, 1889.

Of the certainty of the law and the uncertainty of judicial decisions, by GEORGE H. SMITH. A discussion of the cause of the uncertainty of judicial decisions.

Ballot reform: its constitutionality. By JOHN H. WIGMORE.

The determination of an agency or authority, by JOHN D. LAWSON. An agency may be determined by the performance of the object or lapse of time, by the act, bankruptcy or death of either the principal or agent, in some cases by marriage, as where a *feme sole* gave a power of attorney to sell land and married (evidently not being under statutes such as we now have), by the insanity of the principal or agent, by the destruction of the subject matter. The effect of war upon agency is touched upon, and special cases are considered. A very useful collection of cases upon attorneys' duties is contained in this article, which also covers authorities and powers coupled with an interest.

Condition of the law as to combinations, by AUSTIN ABBOTT. As the law stands at present, a combination to raise wages is lawful, but a combination of employers to raise prices in order to cover the increased expense is unlawful.

Acquisition of citizenship, by PRENTISS WEBSTER. A very interesting article from the international point of view founded on the case of a Chinaman. Chin King was born in San Francisco of Chinese parents, who were Chinese subjects. While a minor she returned to China with her mother, and subsequently returned to the United States. It was held that she was a United States citizen.

Marriage in private international law, by EMILE STOCQUART. A statement of the law as to capacity and ceremony in France, Belgium, Italy and Holland.

Judicial independence, by H. B. BROWN. The learned writer, while not condemning election as a mode of appointing Judges, thinks that they would be rendered more independent by lengthening the term of office and disqualifying them for re-election. He also discusses the manner in which Judges are hampered in the United States in jury trials.

Ibid.—November-December, 1889.

Explaining alterations, by AUSTIN ABBOTT. A short statement of the rules in practice as to dealing in evidence with documents containing alterations.

The centenary of modern government, by SIMEON BALDWIN.

By-laws of beneficial and voluntary societies, by EUGENE MCQUILLIN. The power to make by-laws is treated of first. They must not discriminate, must be consistent with the constitution, the charter of the society, municipal law and public policy, and must be reasonable. Many cases are cited.

The coupon legislation of Virginia, by MORRIS GRAY. An article on the repudiation of its debt by this State.

Marriage in private international law, by EMILE STOCQUART. Concluded from last number. States the law of Germany, Russia, Saxony, Bavaria, Wurtemburg, Austria and Hungary, and Switzerland.

Central Law Journal.—10th January, 1890.

When May a Stranger intervene in a Suit in Equity, by WILLIAM WEBSTER. A consideration of those cases in which a petition may be presented or a motion made to the Court for summary relief by a party not originally a party to the litigation.

Ibid.—17th January, 1890.

The Law in Relation to Commitment of Minors, by LEWIS HOCHHEIMER. The American statutes relating to confinement of minors for punishment and for guardianship and the decisions thereon are dealt with.

Ibid.—24th January, 1890.

Res Adjudicata in Church Courts, by WM. H. BURNETT. After citing several cases the learned writer says that the conclusiveness of the findings has been touched in only two points. One, those instances where a fact has been established by the society. Some authorities hold this conclusive; others, that the value of this decision depends upon whether the society followed its established rules. The other point is the right of the society to exact conformity to rules of opinion and conduct which it has established. In two or three cases it has been held that the society's decision on the subject will be accepted.

Ibid.—31st January, 1890.

Mortgages to Secure Future Advances, by ISAAC N. HUNTSBERGER. The subject is discussed as to the effect between parties, and as to third parties. The rule as to third parties is said to be that the mortgagee retains his priority only as to advances actually made before notice of another mortgage subsequently created. Under our system where registration is notice, the application of this rule would make the first mortgage good only for the amount actually advanced up to the time of registration of a subsequent mortgage.

Ibid.—7th February, 1890.

Specific Enforcement of Contracts to Convey Homestead, by PHILALETHES. The universal rule is that as the wife has a controlling power over the conveyance of a homestead, a contract by the husband alone to convey cannot be specifically enforced.

Criminal Law Magagzine.—July, 1889.

Public indecency, by SOLON D. WILSON. The learned writer deals with indecent exposure and indecent publications. As to the former the place of the exposure must be public; and judicial definitions of public places are given, with many pointed decisions on the whole scope of the law. The form of the indictment and sufficiency of proof are also dealt with. As to publications—indecent and obscene language are treated of, as well as obscene pictures, stories, etc. The evidence and form of indictment are also discussed.

Withdrawal of plea of guilty, by M. W. HOPKINS. The learned writer, after discussing cases, concludes that when there is an inducement of any kind held out to the prisoner, by reason of which he enters a plea of guilty, it will comport with sound judicial discretion to allow the plea to be withdrawn and a plea of not guilty to be entered.

Ibid.—September, 1889.

Admissions and confessions in criminal cases, by STEWART RAPALJE. The learned writer cites many American cases on the effect generally of admissions and equivocal silence and failure to deny. He then deals with confessions made by persons under arrest, and before magistrates and coroners; by children and intoxicated persons; what inducement will and what will not exclude a confession. He also treats of the necessity of corroboration, the effect of the confession in evidence, etc.

Ibid.—November, 1889.

Depositions in criminal cases, by GEO. C. WORTH. English and American authorities are cited as to the proper mode of taking and certifying depositions.

Foreign penal laws and offences, by JAMES M. KERR. An anomaly arises from the rules that one nation cannot execute the penal laws of another state, for a criminal might in a neighbouring state commit an offence against the laws of a country and then return to that country and remain unmolested. This rule is criticised. Statutes enabling offences of the kind to be punished are cited, and English and American cases.

Ibid.—January, 1890.

Insanity and criminal responsibility, by D. H. PINGREY. The rule in *McNaghten's case* is cited and stated to be the general rule in the United States. The medico-legal test is criticised, and though followed in some of the states, is disapproved of generally as tending to a recognition of moral insanity which is also generally condemned though recognized in some states.

Waiver of jury in criminal cases, by NATHAN NEWMARK. In capital cases or cases of felony there is no waiver, but in trials for misdemeanors the court may with defendant's consent try him without the full number of jurors.

THE

CANADIAN LAW TIMES.

JUNE, 1890.

THE LAWS OF BRITISH COLUMBIA.

THE interoceanic communication established by the construction of a transcontinental railway and telegraph system through Canada has made the union of the Provinces an actuality, and we can assume that this interprovincial contact will vivify the interest in and draw attention to the laws of the extreme western portion of the Dominion to a greater degree than in the past. The geographical and physical conditions of the various Provinces produce a variety of laws adapted to the wants and necessities of the people, tending to promote the development of the natural resources of the country. Before proceeding to a short review of the present laws of British Columbia it will be interesting to briefly follow the early occupation of our Pacific coast, and the institution and establishment of the colonial laws.

The early history of the Province is inseparably connected with the Hudson's Bay Company. The source of the authority, which enabled this great company for nearly two centuries to have almost undivided and undisputed sway over the vast territory which comprised the whole of British North America beyond the limits of the older Provinces, is found in a Royal charter granted in 1670 in the twenty-second year of the reign of Charles II. This charter, amongst other things, ordained and declared that the Governor and Company of Adventurers trading into Hudson's Bay should be incorporated by that name, and did

"give, grant and confirm unto the said Governor and Company and their successors the sole trade and commerce of all those straits, bays, rivers, lakes, creeks and sounds in whatsoever latitude they should be that lay within the entrance of the straits commonly called the Hudson's straits; together with all the lands and territories upon the countries, coasts, and confines of such waters aforesaid that were not already actually possessed or granted to any of His Majesty's subjects or any other Christian Prince or State with the fishing of all sorts of fish, whales, sturgeons, and all other royal fishes in seas, bays and rivers . . . and all mines royal as well then discovered as not discovered, of gold, silver, coins and precious stones to be found or discovered within the territories, limits and places aforesaid, and that the said land should be from thenceforth reckoned and reputed as one of His Majesty's plantations or colonies in America. And further, His Majesty doth hereby make, create and constitute the said Governor and Company for the time being and their successors the true and absolute lords and proprietors of the same . . . to hold, possess and enjoy the said territory to them to be holden of His Majesty and his heirs as of His manor of East Greenwich, in the County of Kent, in free and common socage and not *in capite* or by knight's service, yielding and paying therefor yearly to His Majesty, his heirs and successors, for the same, *two elks and two black beavers, whensoever and as often as his said Majesty, his heirs and successors, should happen to enter into the said countries, territories and regions hereby granted.*" The holding thus became the largest, probably, that was ever created, and the courtiers of the King little knew the extent of territory they were granting. The royal exchequer was not benefitted, but the move was a wise one. The unpeopled solitudes of British North America were won for Great Britain, "and it was but an accident that the construction of these little picket-fenced enclosures did not lead to the acquisition by Great Britain of an empire no less valuable than is now the Dominion of Canada" (*a*).

(*a*) Bancroft's History of British Columbia. Preface.

The Hudson's Bay Company had thrown out their octopus-like arms, and embraced a continent, although their right to territory on the Pacific slope was never acknowledged under the original charter. Thus we find that when the Pacific Fur Company, the rival American company, penetrated to the Pacific slope, they found the English company disputed the possession of the Columbia district. Upon the representations of this company the American Congress directed their attention to the country through which the Columbia River flowed, and reported that all territory in question from the 41st to the 53rd parallel, if not to the 60th, of north latitude belonged to the United States. Their claim to its possession was grounded upon the Louisiana purchase from France in 1808, and the acquisition of the title from Spain by the Florida Treaty of 1818, together with rights of occupation. However ridiculous these claims appear to us now, in the light of further knowledge and research, still, at that time, there existed a dense ignorance of the geographical and historical relations of the territory in dispute, and an inadequate appreciation of the vast wealth and resources of the country. The Americans were more than partially successful in their contention; we will therefore confine ourselves to the government of the territory meted out by the Oregon boundary settlement to Great Britain.

Early in the present century the Imperial authorities were advised that constitutional law and order were ignored in the country over which the fur trading companies had jurisdiction, in consequence of which an Imperial statute affecting the administration of justice in that part of Canada which is now British Columbia was passed.

The object of 43 Geo. III. c. 138 is explained in the title, "An Act extending the jurisdiction of the Courts of Justice in Upper and Lower Canada to the trial and punishment of persons guilty of crimes and offences within certain parts of North America adjoining the said Provinces." The imperfect knowledge of the geographical position of the older Provinces of Canada, in their relation to the fur-

bearing country, which existed among the wiseacres of the Colonial Office, is palpable in this Act.

The country over which the Act extended *adjoined* Upper Canada at a distance of over 2,000 miles. The Act provides that the Governor of Lower Canada, for the time being, shall have power to authorize any person resident within any of the Indian territories or parts of America not within the limits of the said Provinces to act as magistrates for the purpose only of hearing evidence as to crimes and offences, and committing any persons found guilty to safe custody, in order to have them conveyed to Lower Canada to be dealt with according to law. Section 3 provided that offenders may, if the Governor thought more convenient, be tried in Upper Canada.

The above Act was supplemented by further Imperial legislation in the Act of 1 and 2 Geo. IV. c. 66, entitled, "An Act regulating the fur trade, and establishing a criminal and civil jurisdiction within certain parts of North America." It recites, "whereas the competition in the fur trade between the Hudson's Bay Company and certain associations of persons trading under the name of the North-West Company of Montreal has been found for some years past to be productive of great inconvenience and loss to the trade in general, and also of great injury to the native Indians and other subjects . . . and have also for some years past kept the interior of America to the westward of Lower and Upper Canada in a state of continual disturbance, and that many breaches of the peace extending to loss of lives and destruction of property have continually occurred therein . . . and further, that it is expedient that some more effective regulations should be established for apprehending, securing and bringing to justice all persons committing such offences, and removing doubts as to the extension of 43 Geo. III. c. 138 to the Hudson's Bay Company's territories, it enacts: Section 1. His Majesty may make grants for exclusive trade with the Indians in certain parts of North America; thus repudiating the semi-independence asserted by this colossal cor-

poration. Section 3 required the trading companies to keep a register of all employees and return duplicates to the Secretary of State, and duly execute all process, criminal and civil, for producing and delivering all persons in their employ or acting under their instructions, charged with any offence, and for preventing or diminishing the sale of spirituous liquors to the Indians, and promoting their moral and spiritual improvement. The foregoing section was a wise one, as in the fastnesses and solitudes of these far distant posts it was impossible to apprehend offenders, and a spirit of defiance to the law had been engendered.

Section 6 provided that Courts of Judicature established in Upper Canada should take cognizance of causes arising in Indian territories, and that every contract, agreement, debt, liability and demand arising in Indian territory should be deemed to be of the same nature and be cognizable by the same Courts and tried in the same manner as if the same had arisen in Upper Canada; this section had one exception to the jurisdiction of the Courts of Upper Canada, which shows that the Imperial legislators questioned the ability of Canadian law-makers; it closes with, "Provided that all such suits relating to lands not being in Upper Canada shall be decided according to the laws of that part of the United Kingdom called England, and not subject to the Legislature of Upper Canada."

These two Imperial statutes contain the only provisions made for the administration of justice in British Columbia until a comparatively recent date. For a proper understanding of their impracticability, so far as the Pacific slope is concerned, we will quote Lieut. Mayne, who in 1862 wrote as to the routes to British Columbia: "There are at present four. 1st. By steamer to Aspinwall, across the Isthmus of Panama and thence by American packets to San Francisco, thence to Victoria; time occupied being from six to eight weeks. 2nd. Round Cape Horn through Magellan Straits; this trip taking from three to five months. 3rd. Across the continent from Lake Superior to Red River, and thence to Rocky Mountains; this route

being virtually impracticable. 4th. Across the continent in American territory to California, thence to Victoria by steamer" (*b*).

We can see from this that by the time process was executed and the offender landed in Lower Canada or Upper Canada it would be difficult to prove his identity. The writer has not been able to find a single instance where the eastern Courts were called upon to exercise their extraordinary statutory jurisdiction; the tomes of legal lore at Osgoode Hall may divulge a case to the curious inquirer.

The two Acts mentioned were repealed in their application to Vancouver Island by 12 and 13 Vict. c. 48, "An Act to provide for the administration of justice in Vancouver Island."

Vancouver Island was a separate colony up to 1866, when the union of the two colonies took place. The Act of 12 and 13 Vict. enacted "that it shall be lawful for Her Majesty to make provision for the administration of justice in the said island, and for that purpose to constitute such courts of record and other courts, with such jurisdiction in matters civil and criminal and such equitable and ecclesiastical jurisdiction and appoint and remove judges." Sect. 2 granted powers to legislatures to make provision for the administration of justice.

Governor Blanshard, the first governor of the colony, arrived at Victoria on the 10th day of March, 1850, and in April of the next year resigned and left for England, disgusted with the island, the Hudson's Bay Company and the country, without exercising his authority of constituting courts. In September, 1851, James Douglas was made governor; he was also chief factor of the Hudson's Bay Company, thus uniting, in one person, the authority and interests of the Hudson's Bay Company and of the Colonial Government (*c*).

Governor Douglas issued proclamations and formed a legislature, the constitutionality of which has been doubted

(*b*) "British Columbia and Vancouver Island, p, 356. By Lieut. Mayne, R. N.

(*c*) Bancroft's History Br. Col., 286-309.

but was afterwards confirmed; he also, by virtue of the authority vested in him by the Crown, appointed David Cameron, a retired draper, Chief Justice, who in turn was succeeded by Chief Justice Needham, who held office until the union of the island with British Columbia, in November, 1866.

Many of the laws enacted for Vancouver Island are the basis of the existing laws in the Province of British Columbia. On the 18th January, 1860, was passed "an Act to facilitate the transfer of real estate and to provide for the registration of titles" (*d*), introducing a quasi Torrens system into the colony which, as amended, we will refer to hereafter in detail.

A "proclamation relating to the acquisition of land, 19th Feby. 1861" (*e*), provides that the upset price of all country land shall be from henceforth 4s. 2d. an acre; it also sets out many other provisions relating to pre-emption, survey, etc., and as repeatedly amended (the Act of 1870 repealing and consolidating no less than twelve Acts and ordinances) is now the "Land Act," Con. Stat. B. C. 1888, c. 66. Another Act which for originality attracts attention as being the only early act which is transmitted in its original form to the Con. Statutes of 1888 is "an Act to prohibit swine and goats from running at large in the town of Victoria"(*f*). It enacts that owners of premises may shoot such animals when found trespassing, and makes it the duty of the superintendent of police "to kill all and every of such animals which they shall find to be at large." With such an heroic remedy at hand the citizens of Victoria and the island are not troubled with these naturally migratory animals.

Most of the laws of the separate colony of Vancouver Island which appear in the table of the consolidation of 1871 deal with commercial, revenue and municipal matters, and with court procedure, and at confederation, immediately

(*d*) The Laws of Br. Col.. 1871. No. 3, Appendix.
(*e*) *Ibid.* No. 4, Appendix.
(*f*) Laws of B. C., 1871. No. 5.

subsequent to which they were consolidated, had been mostly repealed or had been merged into later enactments.

The separate colony of British Columbia or the mainland was brought into legislative existence by Imperial Statute 21 and 22 Vict. c. 90, passed 2nd Aug., 1858, but was not proclaimed until 19th November by Governor Douglas at Fort Langley *(g)*.

The Act recites that "whereas divers of Her Majesty's subjects and others have . . . resorted to and settled on certain wild and unoccupied territories on the north-west coast of North America commonly known as New Caledonia, and after the passing of this Act to be known as British Columbia."

Sec. 2 gives the boundaries of British Columbia, which were afterwards enlarged by 26 and 27 Vict. c. 83 *(h)*.

The Act of 21 and 22 Vict. c. 99, gave a liberal constitution to British Columbia. It provided that by an Order-in-Council a governor could be appointed to make provision for the administration of justice and "generally to make, ordain and establish such laws, institutions and ordinances as may be necessary for peace, order and good government," and that Her Majesty might empower such officer to constitute a legislature, such to consist of the governor and a council, or council and assembly. After reciting 43 Geo. III. c. 138, and 1 and 2 Geo. IV. c. 66, it repealed the same. At the same time and place that the Act was proclaimed at Fort Langley a proclamation introducing the civil and criminal laws of England into British Columbia was also issued.

On the 2nd day of September, 1858, Sir James Douglas was appointed Governor, and Sir Matthew Baillie Begbie *(i)*, the present Chief Justice, was by commission under the Royal signet and sign manual, appointed Judge. The Mainland laws were from this time until January, 1864, made by the Governor under proclamations. A Royal order dated 11th June, 1863, revoked the Order-in-Council grant-

(*g*) Laws of B. C., 1871. No. 30, Appendix.
(*h*) *Ibid.* No. 36, Appendix. Laws B. C., 1871.
(*i*) Bancroft's History B. C. 423-426, *et seq.*

ing authority to make laws and provided for the constitution of a Legislative Council (*j*).

The proclamations of Governor Douglas are useful only for reference; some have been absorbed into later Acts, but most of them have been repealed, having answered the purpose for which they were made (*k*). The orders and proclamations governing the legal profession and the practice in the Courts are interesting as a history of the growth of the profession and practice. In 1858 Mr. (now Mr. Justice) Crease was the only qualified barrister in the two colonies (*l*). The gold mining and land laws and the building of highways to open up the country largely engaged the attention of the Legislature during the early period. In 1858 the first great gold excitement took place in the Fraser River district and in one year British Columbia became the peer of California. The proclamations and laws showered on the motley crowd of fortune hunters both before and after Douglas had authority were numerous, and as varied as the people for whom they were made. They were, however, effective and the promptness of the executive and judicial authorities of that day deserves favourable comment. The Pacific Coast historian says: "The consequence of it all was that never in the pacification and settlement of any section of America have there been so few disturbances, so few crimes against life and property" (*m*).

J. A. FORIN.

NEW WESTMINSTER, B.C.

(To be concluded.)

(*j*) Laws of Br. Col., 1871, No. 60, Appendix.

(*k*) Table of Laws, 1871.

(*l*) Order of Court, by Begbie, J., No. 27. Laws of B. C., 1871, and Report "Thrasher Case," p. 33.

(*m*) Brancroft's Br. Col., p. 431.

tures to suggest that it is not a dignified procedure, and that it must be very unsatisfactory to counsel who attend to hear judgment. Be that as it may, in the case under review counsel for the plaintiff duly attended to hear judgment, when the following formula was gone through:

Mr. Justice Strong.—The Chief Justice has handed in his judgment, and he is of opinion that the appeal should be allowed with costs. I myself am also of the same opinion for reasons which I will hand to the reporter.

Mr. Justice Fournier.—I think the appeal should be dismissed with costs for reasons stated in the judgment of Mr. Justice Gwynne.

Mr. Justice Taschereau.—I think the appeal should be allowed with costs for the reasons stated in the judgment of Mr. Justice Strong.

Mr. Justice Gwynne.—I think the appeal should be dismissed with costs for reasons which I will hand to the reporter.

Mr. Justice Strong.—The result is that the appeal is allowed with costs.

It was thus manifest that the judgment of the court and the value of the decision depended entirely upon the judgment of the Chief Justice, but as no judgments were read counsel had to wait until the court rose and borrow them from the reporter.

The judgment then, upon which the rights of the parties to this action are determined, and by virtue of which the unanimous decisions of the Court of Appeal and of the Queen's Bench Divisional Court were reversed, is as follows:

"I am of opinion that the appeal should be allowed with costs. (Signed) W. J. RITCHIE."

Is it possible that the Chief Justice when he wrote the above judgment, knew that the other members of the Court were equally divided? If not, is it possible that he handed in the above as his judgment, without enquiring the views of his brother judges, when his might have been the only judgment in favour of allowing the appeal?

Next morning counsel for the plaintiff attended at the opening of the court, and formally enquired the reasons upon which the Chief Justice based his decision, when Mr. Justice Strong announced that the Chief Justice based his judgment upon the release given by the plaintiff to the C. P. R. Co. before the trial. Counsel for the plaintiff then attempted to point out that, upon such a finding, the judgment of the Court ought to be for the plaintiff and not for the defendants, but Mr. Justice Strong enforced a judicial *cloture* by stating that the Court would not permit its judgments to be discussed after they were once pronounced.

An unsuccessful motion on behalf of the plaintiff was thereupon made to the Privy Council for leave to appeal, to which we shall have again to refer.

So much for the facts and the proceedings in the case so far as the writer has been able to gather them from the printed appeal case and the judgments in the various courts and from personal investigation. What then is the effect of the judgment from a professional point of view?

Assuming that Mr. Justice Strong was correct when, as the mouthpiece of the court, he announced that the Chief Justice based his judgment upon the release, it is manifest that no point of law whatever was decided by the Supreme Court, for the judges were two against two on the main questions, while the Chief Justice stood alone in the ground of his judgment. Consequently every point of law decided by the Court of Appeal remains unreversed.

The head-note of the latter decision (*b*) indicates that two points were decided by that Court, namely:

(1) That the defendant's 10th condition had not the effect of limiting their liability to matters occurring on their own line.

(2) That the provisions of the Railway Act, R. S. C. cap. 109, sec. 104, do not apply to a contract to carry goods over other lines, even though such are within the territorial jurisdiction of the Parliament of Canada.

The former point was undoubtedly decided as indicated in the head-note, but a careful perusal of the judgments of

(*b*) 15 A. R. 15.

the four learned Judges in Appeal has failed to satisfy us that the second point was decided.

It must be borne in mind that the Queen's Bench Divisional Court decided that the above provision of the Railway Act did apply to the contract in question, so that it would require three of the judges in appeal to reverse the finding of the Queen's Bench Division on that point.

Let us see how it turned out. Burton and Patterson, JJ.A., agreed that the Railway Act did not apply. But Osler, J.A., says, at p. 28, "it seems unnecessary to decide, and I do not decide whether it comes within the decision in *Vogel* v. *G. T. R.*, as that case was applied in the Court below, or whether the defendants can contract themselves out of liability for loss caused by negligence in the carriage of the goods where it occurs elsewhere than on their own line of railway. I concur in dismissing the appeal." Immediately following the above statement by Osler, J.A., is the judgment of the Chief Justice, Hagarty, C.J.O. "I agree in the judgment just pronounced," from which, as well as from the rest of his judgment, we gather that he agreed with Mr. Justice Osler in *not* expressing an opinion against the view adopted by the Divisional Court.

If this were the first case which had come before the Supreme Court where two of the Judges thought that judgment should be entered for the appellant, and two thought it should be entered for the respondent, and the fifth was for a new trial, we could better appreciate the difficulty the Court might feel as to the judgment of the Court; but it so happens that in *The Confederation Life Association* v. *O'Donnell* (c) this very difficulty occurred, and their Lordships solved it, most properly as we think, by ordering a new trial.

Why was not the same course pursued in the present instance? The singularity of the case does not by any means end here, in view of the ground adopted by the Chief Justice.

The release to the C. P. R. Co. was not pleaded, and when the G. T. R. Co. moved before the Divisional Court for a new

(c) 13 S. C. R. 218.

trial in order to set it up, their motion was refused. Such motions, as we understand, are always addressed to the discretion of the Court, and law regarding them is as follows :—

"No appeal shall lie from any order made in any action, suit, cause, matter, or other judicial proceeding which shall have been made in the exercise of the judicial discretion of the Court or Judge making the same; but this exception shall not include decrees and decretal orders in suits, causes, matters, or other judicial proceedings in equity, or in actions, or suits, causes, matters, or other judicial proceedings in the nature of suits or proceedings in equity instituted in any Superior Court" (*d*).

But suppose that in this case the defendant's motion before the Divisional Court was not a matter of discretion, and was appealable, and suppose that three of the Supreme Court Judges agreed in allowing the appeal on this point, the result should have been a new trial, and not a judgment for the defendants.

As we have said, a petition was presented on behalf of the plaintiff before the Privy Council, for leave to appeal, but was refused, by reason of certain Rules laid down by their Lordships in the case of *Prince* v. *Gagnon* (*e*) to the following effect: "Their Lordships will not advise Her Majesty to admit an appeal from the Supreme Court of the Dominion save where the case is of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very substantial character."

In dealing with the only ground upon which the plaintiff, in the case under review, could have expected to succeed in escaping from the effect of the above Rules, namely, that *some important point of law* was involved in the case, Lord Watson said: "Then it is said that the judgment of the Supreme Court establishes an important precedent. If it had done so, as their Lordships have already indicated, there might have been some reason for entertaining this

(*d*) 42 Vict. cap. 39, sec. 2. (*e*) 8 App. Cas. 103.

application. But again, on examining the judgment as set forth in these papers, it turns out that upon the question of law the learned Judges were two to two, and the decision went upon the ground that a fifth Judge, the learned Chief Justice Ritchie, was of opinion that the point which the other learned Judges had differed upon did not arise in this case. It is quite impossible that a judgment attained by such division of opinion can bind the Supreme Court of Canada or the Courts of Appeal in the Provinces."

The judgment of the Privy Council, refusing leave to appeal, was delivered more than a year ago, and must have been in the hands of the Supreme Court Reporter before the publication of the report in question. Why was it not alluded to?

We have now given an historical account of the proceedings, and we proceed to deal with the report of the case which has recently come to hand. The second clause of the head note asserts, apparently as the decision of the entire Court, that the decision in *Vogel* v. *G. T. R.* (*f*) does not govern. This, as we have endeavoured to show, was not decided either by the Supreme Court or the Court of Appeal, but on the contrary the judgment of the Q. B. D., holding that *Vogel* v. *G. T. R.* did govern the case, remains unreversed.

After expressing the equal division of opinion regarding the 10th condition, the head-note proceeds:

"Another condition of the contract provided that no claim for damages to, loss of, or detention of goods should be allowed, unless notice in writing with particulars was given to the station agent at or nearest to the place of delivery within 36 hours after delivery of the goods in respect to which the claim was made.

Held, per Strong, J., that a plea setting up non-compliance with this condition having been demurred to, and the plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was *res judicata*."

(*f*) 11 S. C. R. 622.

One would gather from this that Strong, J., alone held this opinion, but as we have seen, Taschereau, J., agreed with the judgment of Strong, J. But curiously enough it so happens, as an examination of the pleadings in the appeal case discloses, that the plea in question *was never demurred to at all.*

The next paragraph of the head-note: "*Held, per* Strong, J., Gwynne, J., *contra*," is open to the objection above indicated inasmuch as neither of these learned Judges stood alone in his opinion.

The statement of facts set out in the report is quite as misleading, or perhaps we should say as careless, as the headnote above analyzed. On page 546 we find the following statements:

"The Canadian Pacific Railway Company were made defendants to the action, and while the proceedings were pending the plaintiff accepted a sum of money in satisfaction of his claim against them, *which the defendants alleged operated as a release* of the whole cause of action and a bar to any further proceedings by the plaintiff in the suit."

No reference whatever is made to the fact that the release in question was never pleaded, nor alluded to at the trial, and that it was alleged by the defendants before the Divisional Court only by way of motion for a new trial. On the same page the following remarkable statement of facts and findings occurs:

"The plaintiff claimed that the goods were not carried on the special contract but on a verbal agreement, and on the trial the jury so found, *the defendants in their opinion having failed to prove the delivery and acceptance of the bill of lading* from which the above extracts are taken *and the release.* The trial Judge disregarded the finding of the jury on this point, and holding that there was a special contract and that under it the defendants were not liable, gave judgment in their favour."

A very casual glance at the evidence and judgments in the Courts below would have shewn the reporter that the jury made no such finding as stated above. They found that the agreement was verbal, and that the plaintiff's

agent had not *signed* the bill of lading, but that the defendants did deliver to the plaintiff's agent a receipt which contained the conditions printed upon similar to those on the bill of lading.

The release mentioned in the above statement requires a little explanation.

The appeal case shews that at the time of shipping the goods the defendants required the plaintiff's agent to sign a document which was not filled up, but which was expressed to release "all the railway or steamship companies over whose lines said goods may pass to destination," etc.

This release was pleaded, and possibly the learned Chief Justice Ritchie may have thought that this was the release to the C. P. R. Co. Be that as it may, the jury did not and could not have found against the delivery of the document to the defendants, as stated in the report, for the plaintiff's agent, as the appeal case shews, *admitted his signature to it.* But not a single Judge pronounced in favour of its validity.

Trial by jury would indeed be a farce if, as the report indicates, the judge may disregard a finding of fact and enter judgment the other way.

If we are correct in the view we have taken as to the points decided in the lower Courts and not reversed by a majority of the Supreme Court Judges, we reach the following anomalous results in this singular case:

(1) By virtue of the Railway Act the defendants are not entitled to rely upon any conditions whatever as against the plaintiff.

(2) According to the construction placed upon the defendants' conditions by the Court of Appeal, and not reversed by any three Judges of the Supreme Court, the conditions are not so framed as to protect the defendants from liability.

(3) The expressions of opinion by Mr. Justice Strong, and by the Chief Justice (as explained in open Court), are, so far as they differ from the opinions of the Courts below,

merely *dicta*, not binding upon the Supreme Court or any other Court.

(4) And yet the plaintiff's action is dismissed with costs.

The plaintiff possibly may be sufficiently magnanimous to feel gratified at thus settling the law in favour of his fellow shippers at his own expense; but he may fairly claim the palm as an exponent of the ancient maxim, *summum jus summa injuria*.

AMICUS CURIÆ.

EDITORIAL REVIEW.

Resignation of Mr. Justice Proudfoot.

By the resignation of Mr. Justice Proudfoot the Bench of Ontario loses one of its soundest equity judges. Had it not been for an illness which affected Mr. Proudfoot's hearing to a great degree, we would no doubt have been spared for some time what will be felt as a great loss. He retires, however, after a long and useful incumbency, and well deserves a rest.

In addition to his undoubted learning in Equity, Mr. Proudfoot possessed a good knowledge of Roman law and general jurisprudence.

Being a stout adherent of the old order of things whereby equity was dispensed in a separate Court, Mr Proudfoot (it may be said without disrespect) stood greatly in the way of the complete fusion of the Courts. As long as Equity was considered as a distinct branch of our jurisprudence the existence of a separate tribunal for administering it was a necessity. But once the litigant became entitled to have the rules that arose in the independent tribunal applied to all cases, the existence of a separate tribunal became an anomaly. Henceforth the cases resolve themselves into two new classes, distinguishable only by the mode of trial. And to keep in existence a separate and independent tribunal as a mere piece of judicial machinery is to exhaust judicial strength. It is false economy. It is to be hoped that the complete fusion of the Courts will not be longer delayed.

The Process Office.

The existence of the Process Office, which was filled by an incumbent whose long period of service at the Hall (over half a century) was the only claim to its continuance, was an undoubted obstacle to the reformation of the inte-

rior economy of the courts. It was rumoured, or perhaps, rather asserted, more than once that when the office became vacant it would be abolished, and it is to be hoped that this will now be done. There is no reason why a special office should be kept open for the issue of writs of summons alone. In the Court of Chancery all proceedings, from filing the bill down to the time of going to trial, were taken in one office, and after judgment, which was entered in the registrar's office, writs were issued from the office in which the proceedings commenced. Instead of this being inconvenient it was attended with the greatest convenience and simplicity, and simplicity and convenience would result from its adoption now. We have, in theory, one court divided into three parts for the despatch of business only, and one system of procedure. We have in practice, really, three courts and a process office, and three distinct modes of procedure, one in each of the divisions. So great is the influence of lath, plaster and tradition upon legislation.

The practice in Chancery Chambers was so utterly different from that in Common Law Chambers that if the procedure had been assimilated and the Chambers kept apart, tradition would have over-ridden the most violent attempts at reform. As it is, the practice in Judges' Chambers remains almost as before, while that before the Master in Chambers is uniform. The same effect would be produced if there were but one office for writs, proceedings and records. The most strenuous efforts of the profession to bring about this state of affairs could make no headway against tradition and inertia, except to have the rules framed so as to admit of this arrangement and to allow them to remain in suspense for an indefinite period.

The Western Law Times.

We received last month, too late to be noticed, the first number of this periodical, which is published at Winnipeg, Manitoba. It is edited by Messrs. Archer Martin and J. T. Huggard, and in form and general make up bears a flattering resemblance to this journal. It is very spirited

in tone, and we trust that the demise of the *Manitoba Law Journal* is not to be taken as prophetic of the general fate of law journals in the plucky Prairie Province.

Devolution of Estates Act: Procedure.

The procedure under the Devolution of Estates Act, where infants are concerned, is nowhere set out, but depends upon the procedure in administration matters generally, subject to such minor alterations as in the Official Guardian's experience tend to hasten and simplify the proceedings. As this does not seem to be generally known to the profession we print below a system of procedure which we hope may be of use. As the Official Guardian's consent is necessary to a sale of land in certain cases, it will be observed that the rules to be followed relate only to the proceedings necessary to procure his consent. The administration of the estate beyond this must be undertaken by the executor or administrator on his own responsibility.

1. By Rule 1,005, "Before an executor or administrator takes proceedings under *The Devolution of Estates Act* for the sale of real estate in which infants are concerned, he shall give to the Official Guardian or other officer charged with the duties referred to in the 8th section of the said Act notice of the intention to sell, and shall not be entitled to any expenses incurred before giving such notice."

2. Produce the probate or letters of administration to, and leave a copy with, the Official Guardian.

3. Produce evidence by statutory declaration of the next of kin and their respective ages.

4. Produce evidence of the value of the land for the purpose of sale. The testimony of independent experienced and reliable persons is essential.

5. If the land is under mortgage produce a statement from the mortgagee of the amount due on his mortgage if it can be got; if not, some reliable evidence of the amount due.

If negotiations for sale are pending the official guardian will upon the above material assent to the sale if a proper

one. If no negotiations are pending he will assent to a sale to be made.

In the meantime it is necessary for the administrator to

6. Advertise for creditors in the usual way, and prove the advertisement to the official guardian. Produce the sheriff's certificate as to executions against the deceased. All claims, both paid and unpaid, and all known to the executor or administrator, whether sent in or not, must be exhibited to the official guardian.

7. Prove the amount of the personal estate and show what disposition, if any, has been made of it.

8. The widow must elect between her dower and her share under the Act, and the deed of election must be produced. If the land is under mortgage show when it was made, and whether it was for purchase money or for a loan, as dower is to be computed according to circumstances.

9. The purchase money must be paid into the Canadian Bank of Commerce to the joint credit of the executor or administrator and the official guardian.

10. The draft conveyance must be approved by the official guardian; and he will before delivery mark his assent on the conveyance.

BOOK REVIEWS.

The Doctor in Canada, his whereabouts and the laws which govern him. A ready book of reference. By ROBERT WYNYARD POWELL, M.D., Ottawa. Montreal: Gazette Printing Co., 1890.

This is a handy compilation of the various statutes of the different Provinces affecting and useful to the medical profession. Under Part I. are grouped the Acts relating especially to the regulation of the profession. Part II. contains the sanitary legislation of the various Provinces; and Part III. relates to medical education. The remainder of the volume is devoted to the various teaching and licensing bodies, and a directory (so to speak) of all medical practitioners and medical and health officers. It will be a useful, handy book to lawyers as well as medical men for its compilation of statutes.

The Practice on the Crown side of the Queen's Bench Division of Her Majesty's High Court of Justice, (founded on Corner's Crown Office Practice) including appeals from inferior courts, with appendices of rules and forms. By FREDERICK HUGH SHORT, chief clerk of the Crown office, author of "Taxation of Costs in the Crown Office," and Editor of "Crown Office Rules and Forms, 1886"; and FRANCIS HAMILTON MELLOR, M. A., Trin. Coll. Camb., Northern Circuit, Inner Temple, Barrister-at-law. London: Stevens & Haynes, 1890.

Considering the difficulties which practitioners meet with in their efforts to ascertain the proper steps in criminal procedure, it is a wonder that a modern work had not before this made its appearance. The full treatment in compact form, which this work affords, will be welcomed by all who have occasion to resort to it.

THE

CANADIAN LAW TIMES.

JULY, 1890.

PRECATORY TRUSTS.

WE were taught at school that to command, exhort, entreat, or permit, were indifferently expressed by means of the imperative mood; and into such a mood the Chancellors threw themselves when they found words of exhortation or entreaty applied by a testator to his legatee with respect to the property bequeathed. The prayer of the testator, his hope, his confidence, even his knowledge that a certain disposition would be made of the bequest, were treated as imperative, and the legatee was frequently turned into a trustee by what has been called the officious kindness of the Court of Chancery.

It is not our purpose to examine closely into all the varieties of precatory trusts, nor yet into all their peculiarities. Suffice it to say, that when once a trust had been impressed upon a fund, whether precatory or imperative, these two names were of interest only for the bare purpose of classification. Once a trust, it was of little consequence that it belonged to one class or another. In fact, though precatory in terms, the trust was imperative, or it was no trust at all. With regard to their peculiarities, they had none save the name; but they were subject to the same tests as other trusts, and the subject matter and the object had to be well defined in order to answer the general rules as to trusts and their creation.

It is rather with the purpose of showing the great change that has taken place in the decisions of the Courts with respect to the construction of what may be called precatory expressions or terms, that we approach the sub-

ject. The species of trust formerly known as precatory is well nigh extinct. We find expressions in the modern cases from which we might infer that it is altogether extinct; for it is said that the Court will not find a trust unless "intended to be so by the testator" (*a*), or unless it is clear that he intended his words of confidence "to be imperative words" (*b*). These expressions are in one sense inexpressive, and in another too expressive. We may presume for instance, that in every case in which the Court formerly held words of confidence to be imperative words of trust, they so held because they believed that they were "intended to be so by the testator." And notwithstanding prior decisions the same words would now be held to be mere words of confidence and not obligatory words of trust in the technical sense—because "intended to be so by the testator." This expresses nothing in the way of laying down a rule for the guidance of others in construing wills. It merely reiterates that the Court will endeavour to ascertain the intention of the testator. It is too expressive in another sense, for the same reason—the elasticity of the expression. It permits succeeding Judges to interpret the intention as the words happen to strike them. So with the other expression. The precatory words in the older cases were always considered "imperative words." The confidence having been shown to exist by the use of the words the Court made it imperative upon the legatee to carry out the confidence.

The only possible way of arriving at a knowledge of the changing state of the law is to review the modern cases, and endeavour to ascertain the set of the current, and then to hazard a conjecture as to the ultimate principle which (it will in future be said) underlies them.

Lambe v. *Eames* (*c*) is the first important modern case. In that case the testator gave to his widow his estate, "to be at her disposal in any way she may think best for the benefit of herself and family." She disposed of a portion

(*a*) *Re Adams & Kensington Vestry*, 27 Ch. D. 394.
(*b*) *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321.
(*c*) L. R. 6 Ch. 597.

in favor of an illegitimate son of one of the testator's sons, and the gift was upheld. Lord Justice James said: "Now the question is whether those words created a trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this Court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise. The testator intended his wife to remain head of the family and to do what was best for the family. If he had said, 'I give the residue of my property to my three sons, each to take his share, to be at his disposition as he should think best, for the benefit of him and his family'—in such a case it would be clear that the testator did not mean to tie the property up, but give a share to each son, believing that he would do the best for his family."

In *Stead* v. *Mellor* (*d*) Sir Geo. Jessel, M.R., criticised rather freely a decision of Lord Truro's, *Briggs* v. *Penny* (*e*), but for which case, he said, the present would not have been arguable. The words in that case were "well knowing that she will make a good use and dispose of it in accordance with my views and wishes"; and it was held that they created a trust. In this case the words were, as to the residue, "in trust for such of my nieces, M. P. and U. M. P., as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes;" and it was held that they did not create a trust, but that the nieces took absolutely. Sir Geo. Jessel, when speaking of *Briggs* v. *Penny*, said: "Why should the words 'well knowing' bear

(*d*) 5 Ch. D. 225.
(*e*) 3 Mac. & G. 546.

any other than their natural meaning? No reason is given why they should." And he goes on to say, "I am free to inquire what the testatrix did really mean, and unless I find in the will something equivalent to a declaration that the residuary legatees take as trustees, I must hold that they take a beneficial interest. * * The desire being that they shall distribute such residue, not 'in accordance with my views and wishes,' as in the case before Lord Truro, or 'as they know will be most agreeable to my wishes,' but 'as they think will be most agreeable to my wishes'; what is that but to make them judges of the mode of distribution, and place the residue at their absolute disposal?"

So in *Re Hutchinson & Tenant* (*f*), where the words were, "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," the will was held to pass an absolute gift. Sir Geo. Jessel said, "It is alleged on one side and denied on the other, that the words, 'with full power, &c.,' constitute a trust. In my opinion these words standing by themselves, independently of authority, are not intended to impose any obligation on the widow. They are merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation. His widow is to have power to give the property to any one she may think fit; she is to be complete owner of the property, but he expects her to dispose of it among his family, that is, his children." After stating that upon a construction of the words themselves they agree with the construction in *Lambe* v. *Eames*, which his Lordship followed, he added, "both upon principle and in accordance with the most modern authorities, I decide that the widow took absolutely."

In *Re Adams & Kensington Vestry* (*g*), the words were, "I give * * all my real and personal estate * * unto and to the absolute use of my dear wife * * in

(*f*) 8 Ch. D. 540.
(*g*) 27 Ch. D. 394.

full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease." Lord Justice Cotton said, "'The question before us is whether, upon the true construction of the will of George Smith, he imposed upon his wife Harriet a trust. Now just let us look at it, in the first instance, alone, and see what we can spell out of it, and see what was expressed by the will. Reading that will, and I will not repeat it, because it has been already read, it seems to me perfectly clear what the testator intended. He leaves his wife his property absolutely, but what was in his mind was this, 'I am the head of the family, and it is laid upon me to provide properly for the members of my family—my children; my widow will succeed me when I die, and I wish to put her in the position I occupied as the person who is to provide for my children.' Not that he entails upon her any trust so as to bind her, but he simply says, in giving her this, I express to her, and call to her attention, the moral obligation which I myself had and which I feel that she is going to discharge. The motive of the gift is, in my opinion, not a trust imposed upon her by the gift in the will. He leaves the property to her; he knows that she will do what is right, and carry out the moral obligation which he thought lay on him, and on her if she survived him, to provide for the children. But it is said that the testator would be very much astonished if he found he had given his wife power to leave the property away. That is a proposition which I should express in a different way. He would be much surprised if the wife to whom he had left his property absolutely should so act as not to provide for the children, that is to say, not to do what is right. That is a very different thing. He would have said: 'I expected that she would do what was right, and therefore I left it to her absolutely. I find she has not done what I think is right, but I cannot help it. I am very sorry that she has done so.' That would be the surprise, I think, that he would express and feel, if he could do either, if the wife did what was unreasonable as regards the children."

In *Mussoorie Bank* v. *Raynor* (*h*) the words were, "I give to my dearly beloved wife the whole of my property, both real and personal, * * feeling confident that she will act justly to our children in dividing the same when no longer required by her." In the judgment of the Privy Council it is said: "Passing to the merits of the case, their Lordships are of opinion that the current of decisions now prevalent for many years in the Court of Chancery shows that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by Lord Justice James in the case of *Lambe* v. *Eames*, L. R. 17 Eq. 320, and by Sir George Jessel in the case of *In re Hutchinson and Tenant*, 8 Ch. D. 540." It is then stated that to construe the words in this case as imperative would be to extend the doctrine further than it had ever gone before. The judgment then proceeds, "Now these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount and nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be—his appeal to the conscience of the first taker—to be imperative words. In this case nothing is given over to the children of the testator except an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. * * Considering the nature of the property, * * the nature of the

(*h*) 7 App. Cas. 321.

first gift, which, although not expressed in terms to be an absolute gift, is quite unlimited, and is legally an absolute gift, and the fact that the first gift is only cut down by words which do not constitute a direct gift, but are to operate through an influence upon the conscience and feelings of the wife, their Lordships cannot come to any other conclusion than that the testator intended his wife to use the property according to her requirements. This is equivalent to an absolute gift to the wife."

In *Re Diggles, Gregory* v. *Edmondson* (*i*) there was a gift of all realty and personalty to the testator's daughter, and the will proceeded, "And it is my desire that she allows to A. G. an annuity of £25 during her life, and that A. G. shall if she desire it, have the use of such portions of my furniture as may not be required by my daughter." The annuity was paid for a time and then ceased. Cotton, L.J., said: "Does [the direction] impose any trust or duty on her as the Vice-Chancellor has held that it does? I think not. I think that what the testatrix meant was to leave all her property to her daughter, with the expression of a wish that she would allow A. G. £25 a year, and give her any part of the furniture which she did not want. She means to put her daughter in her own place, saying, 'I ask you to make what I think would be a proper provision for A. G.', but without intending to bind her to do so. Construing the will without reference to the authorities, I think that is its true construction." Bowen, L.J., said: "It is urged that it has not been uncommon to translate words of desire or request into words imposing an obligation, and it is said that this will be done 'where the property and the object are certain. But just as uncertainty of the property and object are reasons for not construing the will as creating a trust, so also the fact that a trust would cause embarrassment and difficulty is a reason for coming to the same conclusion. * * The direction is remarkably expressed: 'My desire is that she allows,' which seems to impart that the daughter is to exercise

(*i*) 39 Ch. D. 253.

some choice. What found its way to A. G. was to be dependent upon the action of the daughter. * * I think that there is nothing more in the will than the expression of a hope that this kindness will be shown to A. G., and that no obligation is imposed."

And Fry, L.J., "According to the ordinary meaning of the English language this only expresses a desire and does not import a trust or charge. * * The later cases have established the reasonable rule that the Court is to consider in each particular case what was the testator's intention. Construing this will according to the ordinary use of the English language, I think that the testatrix did not mean to tie up her whole property during the life of A. G., but to give it absolutely to her daughter, trusting to her affection and honour to make such allowance to A. G. as she mentioned in her will."

The general principle of these authorities has been adhered to in Ontario. In *Bank of Montreal* v. *Bower* (*j*), the words were, "And it is my wish and desire after my decease that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her, among my said children in such manner as she shall deem just and equitable." It was held that the gift to the wife was absolute notwithstanding these words.

Reference was made in the latter case to the change in the current of decision, and we may take it for granted, from such dicta as we quote following this, that there has not merely been a determination not to extend the doctrine, but that there has been a complete revulsion of judicial opinion upon the subject, and probably a will containing the identical words of confidence found in an old case would not receive the same construction at the present day. For instance, Lord Justice Lindley in *Re Adams* says, "I am very glad to see that the current is changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator." And Lord Justice Cotton in the

(*j*) 17 Ont. R. 548.

same case, "Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will."

Reference was made in some of the cases quoted from to the argument that authority bound the Court, and that expressions previously held to create a trust ought now to be so held; but that result was denied. Lord Justice Cotton expressly said in *Re Diggles* that though slight expressions were laid hold of to create a trust, the recent authorities have gone the other way. We may take it for granted then that similarity of expression in the precatory portion of the will to words or expressions previously held to create trusts *per se* will not now avail. The words must bear their ordinary English signification and the whole scope of the will must determine the construction.

This much is probably certain. But what is to be the general rule in future can hardly be determined with so much precision. We must still to some extent hazard a conjecture as to the course of decision. But we may perhaps suggest that the expression of a motive, or the giving of a reason for a gift, either of which contains an expression of confidence in the donee will not necessarily constitute the donee a trustee. To elaborate this a little, where the following proposition can be stated with respect to the will there is no trust. The testator desires certain persons to be benefited. He might create a trust for them. Knowing, however, that a certain other person will carry out his own ideas, and having confidence in him that that will be done, it becomes unnecessary to create an obligation. He therefore puts his legatee, in whom he has such confidence, in the same position as himself, and makes him absolute legatee, knowing that there is no necessity to put him under an obligation.

It may be urged that there is no definite rule or conclusion in this proposition, and, that after all it is only begging the question. But if we place it beside the pro-

position which was the natural result of the old decisions, we see the contrast. According to the old cases the following was the mode of reasoning: The testator desires to benefit certain persons. He selects some one in whom, on account of relationship or friendliness, he has the greatest confidence that his desires will be carried out. The intention is to benefit certain others; and a confidence is reposed in the donee; therefore, he is under an obligation called a trust. Both the old and the modern cases recognize the same facts, the same intention; the difference is that the old cases imposed a legal obligation, the latter recognize only a moral obligation, which is none at all.

The technical signification of precatory words having been abandoned, and the Courts having repeatedly stated that they must look at the whole will to discover the intention, the logical result is that precatory trusts are abolished and that nothing but an imperative direction, or a direction so clear in its terms as to indicate what the donee must do to carry out the testator's wishes, will be construed into a trust. For instance, if a testator should bequeath a fund to his wife with a wish that she would use half of it for the benefit of the children, the objection to the want of certainty as to the division of the fund would be gone; and it is easy to imagine cases in which, such a division being made, slight words not amounting in themselves to words of command but taken in connection with the whole scope of the will would sufficiently indicate the intention of the testator that the legatee should take one half absolutely and hold the other half in trust.

A consideration sufficiently embarrassing may arise when there is a bequest to a stranger who is regarded with some degree of confidence by the testator. We have just given instances of cases in which testators have left their property to their wives and have expressed confidence that they would carry out what the testators would have done. Such reasoning as was applied in the cases of *Lambe* v. *Eames*, where the testator was said to intend his wife to "remain head of the family and to do what was best for the family;" and *Re Adams and Kensington Vestry*, where the testator

was said to intend his widow to succeed him and occupy the place which he occupied in his lifetime, cannot well be applied to a person who does not naturally succeed the testator as the head of the family, if the supposed beneficiaries are his children. The question arises, will a different rule be applied? A father knows or believes that his children will be provided for out of the property which he leaves to his wife. He has confidence in her and does not impose a trust. Would the same rule be applied to the case of a stranger in blood, who is under no natural obligation to do anything for the testator's children? Suppose a fund to be left to such a stranger, and the testator to express unbounded confidence that he would do what was right in the education and maintenance of his children. One could not reason as if the legatee were under a natural obligation to support the children, which the testator considered a sufficient one. There is room, in such a case, for a great deal of metaphysical reasoning as to whether it was the education and maintenance of his children that was the motive power in inducing the testator to leave the money to a friendly and discreet person, who he was confident would carry out this object, or whether the friendly and confident feeling towards the legatee was the motive power in trusting him with his estate, knowing that there was no necessity to impose a legal obligation upon him. It is evident in a case like this we must endeavour to ascertain whether it is the wishes of the testator which he directs to be carried out, or whether he leaves it to the legatee to use a discretion which he may or may not abuse, but for the abuse of which there is no redress. No doubt it would shock one's sensibilities to find a testator disinheriting his family in favour of an entire stranger, however friendly he might be, and perhaps the Court would be more ready to adopt precatory words as imperative in such a case than when the estate was left to a wife. But what rule is there? Plainly none when the technical signification of precatory words given them by old cases is abandoned. And again we must revert to the conclusion that unless there is an imperative direction to apply money the bequest must be absolute.

THE LAWS OF BRITISH COLUMBIA.

(*Concluded.*)

Governor Seymour, who succeeded Governor Douglas, proclaimed "The British Columbia Act," 30 Vict. c. 67, on the 17th of November, 1866, by which the colonies of Vancouver Island and British Columbia were united (*a*). By an Order-in-Council, upon the address of both Federal and Provincial Legislatures, British Columbia was admitted into and became part of the Dominion from the 20th day of July, 1871. The conditions are set out in the Terms of Union (*b*).

The first consolidation of British Columbia statutes was made in 1871, and is entitled "The Laws of British Columbia in force at the date of the Union with Canada," and with the appendix is a complete compilation, containing a simple and comprehensive table of laws divided into three parts, shewing: 1st, The laws of the separate colony of Vancouver Island; 2nd, The laws of the separate colony of British Columbia; 3rd, The laws of the united colony up to Confederation with Canada. The second consolidation was made in 1877 and the last in 1888.

The Courts.—There are at present the Supreme Courts, the County Courts and the Small Debt Courts. The last mentioned will be abolished during the present session of the Legislature; they correspond somewhat in their jurisdiction to the Division Courts of Ontario, but the power of adjudication is granted to magistrates appointed by the Local Legislature. The Act is evidently *ultra vires* of the Province and will no doubt be repealed on that account, although some such summary process will have to be established, as the large districts in the interior will need Courts having powers to enforce the payment of small debts and liabilities in a less expensive mode than in the County Courts.

(*a*) No. 43, Appendix, Br. Col. Laws, 1871.
(*b*) No. 54, Appendix, Laws of B. C., 1871.

The Supreme Courts have been established in their present form after many changes, mergers and amendments contained largely in Con. Statutes, 1877, cap. 52, 53, 54 and 56. "The Supreme Court Act," Con. Stat. B. C. 1888, cap. 31, contains the Constitution of the Court. "The Judicature Act, 1879," and "the Supreme Court Rules, 1880," introduced the present practice and abolished the old Common Law Procedure, the Rules being little else than a transcript of the English Rules. "The Judicature Act, 1879," was passed with a view to distribute the Judges of the Supreme Court and locate them at different points in the Province, some being very remote. The districts are Victoria, New Westminster, Clinton and Cariboo. Section 18, cap. 31, C. S., 1888, sets out "The Judicial Districts into which the Province is divided for the purpose of indicating the portions thereof in which the several Judges shall reside and generally discharge their duties shall . . ."

The wisdom of sending Superior Court Judges into remote districts and thus preventing, in a measure, judicial intercourse and interchange of opinions on legal and legislative matters, is very questionable, and cannot help having a depreciating tendency on the Bench by isolating them from active litigation (*c*).

The new Rules of Court which have only appeared in draft form are, as set out in the head note, "copies and modifications of the English Rules of 1883;" these have not received the sanction of the Legislature as yet, and are much more comprehensive than the Rules of 1880, which number 425, while the new Rules number 1071. A few of the latter have been taken from the Ontario Rules, 1887.

The County Courts Act, Con. Stat. 1888, c. 25, contains the County Court Constitution. Districts are established, some of the mainland districts being hundreds of miles in extent. General jurisdiction: (1) In all personal actions where the debt or damages claimed do not exceed $1,000. (2) In any action where the debt or demand claimed con-

(*c*) The Judges of the Supreme Court are Sir M. B. Begbie, C.J., Crease McCreight, Walkem and Drake, JJ.

sists of a balance not exceeding $1,000 after an admitted set-off. (3) In actions of equity where the yearly value of the premises or rent payable in respect thereof does not exceed $300, actions to be brought in districts where land is situate.

Section 44 provides for equitable jurisdiction in many cases where the amount in dispute does not exceed $2500. Any person can appear at the hearing in the County Court as agent of the parties to the action.

The procedure and constitution of this Court could be simplified considerably. It is now set out in two hundred paragraphs, and is more difficult of construction than the Supreme Court Act. The only persons who claim to understand the Act are the learned non-professional agents whose name is legion, and who with the conveyancers of the same ilk delude the innocent public and denounce the ignorance of the lawyers.

Crown Lands.—Chap. 66 of Con. Stat. 1888, deals with Crown lands. The first Crown lands granted in the Province were by the Hudson's Bay Company under their charter. The lands that they returned as sold, or at least paid for, excepted the rock and swamp lands; in this way we have many valuable building and garden sites which are properly vested in the Province alone, although many doubts have arisen, and the original grantees are disposing of these excepted lands to their own use.

We may dispose of this important branch of legislation by merely mentioning how Crown lands can be acquired. (1) Pre-emption, by actual settlement, for 160 or 320 acres requires occupation and improvements extending over five years, and a payment of one dollar an acre. (2) Crown lands can be purchased for $2.50 an acre. (3) Timber leases are granted for a term of thirty years at ten cents an acre and a royalty of fifty cents per thousand. The grantee must also erect a saw-mill capable of cutting not less than one thousand feet of lumber per day for every four hundred acres. There are also provisions for supply of water for use on land or mines.

The Land Registry.—Con. Stat. 1888, chap. 67. Under this Act there is a "Land Registry Office" in Victoria with an official called the Registrar-General of Titles in charge. There are also District Registry offices. The Registrar and Deputy-Registrar are barristers or solicitors of the Supreme Court. The system of registration is simple, and depends for its efficiency upon the knowledge and judgment of the Registrar or Deputy-Registrar. Section 13 is as follows: "Every person claiming to be the legal owner in fee simple of real estate may apply to the Registrar for registration thereof in the form . . . and the Registrar shall, upon being satisfied, after the examination of the title-deeds produced, that a *prima facie* title has been established by the applicant, register the title of such applicant in a book to be called the 'Register of Absolute Fees,' and shall transcribe in another book, to be called the 'Absolute Fees Parcels Book,' a description of the land to which the title relates."

Sect. 17. "The registrar shall, upon the registration of every absolute fee, issue a certificate of title. . . Every certificate shall be received as *prima facie* evidence, in all courts of justice in the Province, of the particulars therein set forth.

Sect. 18. "The registered owner of an absolute fee shall be deemed to be the *prima facie* owner of the land described or referred to in the register for such an estate of freehold as he legally possesses therein, subject only to such registered charges as appear existing thereon and to the rights of the Crown."

Mortgages and other encumbrances may be registered in the "register of charges" and the description entered in "charges parcels book," cross references being made in the "register of absolute fees" of the charge. Judgments may be entered and will bind lands for three years throughout the Province and may then be renewed: s. 19.

Any person may have an exact entry made in the registry office of any document "word for word, letter for letter, figure for figure, sign for sign, erasure for erasure": s. 38.

Sect. 63 provides that the owner in fee of any land, the title to which shall have been registered for seven years, may apply to the registrar for a certificate of indefeasible title upon affidavit of production and the production of deeds.

Sect. 64. The registrar shall, upon being satisfied of the truth of the statement made in the affidavits, after advertisement and no objections made, issue a certificate of indefeasible title.

Sect. 66. The certificate of indefeasible title shall be conclusive evidence in all courts of justice that the person therein named is the absolute owner of an indefeasible fee simple in the real estate therein mentioned against the whole world (the Crown excepted), but subject as therein expressly set forth.

There are also provisions in the Act for reference to the court, contested titles, penalties, etc., making the Act practicable. British Columbia has an admirable system of land registration in vogue. The knowledge and integrity of the registrar are the guarantee of safety to the public. It is a position of great responsibility, and, on account of the multitude of transfers occasioned by the opening up of the country, his duties are arduous. Great care is exercised in the registry offices, and so far no dereliction of duty has occurred.

Municipal Act.—51 Vict. c. 18. The Municipal Act here as in Ontario seems to be the *bête noir* of the local legislature. The general trend of legislation is the same as in the Ontario Act. The amendments of the present session will number upwards of one hundred, mostly verbal, although there are many important amendments.

The Mineral Act.—Con. Stat., 1888, c. 82. As British Columbia is essentially a mineral country, this branch of the law is of the greatest importance. It is a composite statute, made up of American State and Federal provisions as well as original matter. Sections 77, 78 and 79 are respectively word for word sections 890, 404 and 391 of the United States mining laws. Complaints from practical miners are made that the provisions are not full enough to

cover argentiferous and auriferous mining; there are also complications which have been explained by amendments of 1889. As the future of the country depends largely on this industry, no doubt the laws will receive great attention in the future.

Companies Act.—Con. Stat. 1888, cap. 21. This Act is based upon the legislation of the States of Nevada and California and contains simple provisions for forming companies without the provisions of the incomprehensible English Act. It is taken advantage of, particularly amongst the miners.

Homestead Act.—Con. Stat. 1888, cap. 57. Provides that if a homestead is registered according to the Act it is exempt from seizure to the value of $2,500. Personal goods to the value of $500 are also exempt. This is more generally used for the purpose of covering up fraudulent transactions than to fulfil the object for which it was passed.

Bills of Sale Act.—Con. Stat. 1888, cap. 8. Requires the registration of transfers and mortgages of chattels, without possession, to be made within twenty-one days after execution, renewable every five years. The lapse of time for registration, especially for the coast cities, is much too long and has been taken advantage of for carrying out shady transactions. One week is quite sufficient for all the purposes and would give greater security to the absentee wholesale merchant.

Many Acts relating to taxes, licenses, schools and Provincial institutions have only a local interest.

J. A. FORIN.

NEW WESTMINSTER, B. C.

EDITORIAL REVIEW.

The Distribution of Business.

The report of the Inspector of Legal Offices for 1889 has come to hand with the usual interesting statistics. The distribution of business naturally excites both interest and comment in the present state of affairs, and we find the usual disproportion.

The total number of days occupied in trials was 823, of which the Common Law Division Judges sat 644 days, while the Chancery Division Judges sat 179. There are four Chancery Division Judges, and six in the other Divisions, thus making the average work at trials of each Judge in the Chancery Division 44¾ days, and that of the other Judges 107⅓, or more than double.

The non-jury list for Toronto has not been reached for two sittings, and at the June Assizes of this year the jury list was not finished. In September a fresh batch of cases will be set down, so that the Judge who takes Toronto in September will have in reality three non-jury lists to dispose of, equivalent to the work of a year and a half of Chancery sittings, allowing two sittings a year for that Division as usual, and this in addition to the remanets of June and the jury list and criminal business for September.

Apart from the labour thrown upon one class of Judges in no way distinct from their fellows as to jurisdiction, the public are very much concerned in the present state of affairs. There should be an even distribution of the business, which can only be arrived at by the sittings being held for all cases without distinction, and the Judges sitting in rotation without regard to the Divisions to which they belong.

Out of 41 counties there are 15 in which the Chancery Division Judges hold no sittings. Out of the remaining 26 there were two places, Brantford and Walkerton, in which the sittings occupied one day each; at the same places the Assizes occupied 12 and 10 days respectively. In nine of

the remaining places the sittings occupied two days each; while in the same places the Assizes occupied from 4 to 13 days each, and Cobourg, which had a special trial, 64 days. Of the remaining places four had sittings of 3 days each, and Assizes of 12, 7 and 6 days respectively. In only one place the sittings were lengthier than the Assizes, viz., Stratford, 15 days to 8. At Ottawa there were 17 days for each; but in every other case the disproportion is most striking. For instance, St. Thomas Assizes 13, Sittings 7; Kingston Assizes 14, Sittings 7; Belleville Assizes 24, sittings 9; Chatham Assizes 15, Sittings 6; Brockville Assizes 18, Sittings 4, London Assizes 30, Sittings 5; Barrie Assizes 21, Sittings 8; Guelph Assizes 9, Sittings 4; Hamilton Assizes 32, Sittings 4. At many of the Assizes, it must be borne in mind there are a good many remanets, while a remanet at a Chancery sittings is a *rara avis*.

It is evident that this course cannot be pursued for a much longer period. The only question is, will the Judges or the Legislature give us the remedy?

Supreme Court of Judicature Rules.

It is a grim satire on the efforts of the revisors of the consolidated rules that the additional rules passed the other day are all collected under the heading of "County Courts," which is the last subdivision, instead of being distributed amongst the proper sub-divisions. If it was worth reducing the rules to order it is worth keeping them in order. The rules were passed on 18th June and published in the Ontario *Gazette* of 21st June. They are as follows:—

1265. In the absence of the Clerk in Chambers, orders made by a Judge of the High Court in Chambers may be signed by the assistant Clerk in Chambers; and such orders signed by the said assistant Clerk in Chambers shall have the same force and validity as if signed by the Clerk in Chambers.

1266. All appeals to a Judge in Chambers from the report, certificate, order, decision, or finding of any officer of the Court must be argued by Counsel.

1267. Rule 1262 is amended by striking out the words "the County of York," and substituting therefor the words "any county."

Rule 1265 does not clearly enough define whether the absence of the Clerk in Chambers is absence from Chambers, absence from Toronto, or absence from the Province; but it is most likely that it will be interpreted to mean absence from the place at which he usually signs orders. A more simple expedient than this rule would have been the amending of rule 544 by inserting the words "or assistant clerk," between "clerk" and "Chambers." Neither rule 544 nor rule 1265 provides for the signing of Chamber orders by a Judge of the Court of Appeal sitting for a Judge of the High Court. As the validity of such an order might be questioned it would have been well to settle the point when the rule was being altered.

The County Court, York.

The appointment of a retiring member of the Ontario Cabinet to the clerkship of the County Court of the County of York dissipates for the present the hope that this office might be made a salaried one. According to the report of the Inspector of Legal Offices for 1889, the average gross earnings of this office for the years 1885 to 1889, both inclusive, was $4,859.08 per annum; the average net amount being $3,804.09. In 1889 the amount earned was $5,620.60; the disbursements were $1,581.19, leaving a net revenue of $4,039.41. As the amount of fees is out of all proportion to the responsibility or labour involved, it has been more than once stated that when the late incumbent of the office vacated it, the next clerk would be put on a reasonable salary, and the excess of fees funded. The process of funding the fees of other offices has been steadily going on for several years even in the lifetime of the officers, who have been put on salaries, and there is every reason why this office should at this juncture have been similarly dealt with. The work could be done and is done by a clerk employed by the County Court Clerk at a salary which is small as compared

with the fees earned, thus leaving practically nothing for the incumbent to do but collect the extra fees.

Apart altogether from the question of expense to the Province or disproportionate payment of the incumbent, it is a bad principle to pay by fees an officer whose duty requires him to construe the tariff. He has no human nature in him if he will not give himself the benefit of the doubt on an ambiguous item.

The Law School.

The Principal's Report of the Law School at Osgoode Hall for the past session, is out. He reports that 283 lectures were delivered, of which 61 were delivered on Real Property, 81 on Equity, 61 on Contract, and 80 on Common Law. The total number of students on the roll was 186, and the average attendance about 110. As the school was in its experimental year we must not regard the result as indicative of the ultimate scope of its work. There was but one class necessarily, while next year and in succeeding years there will be three.

The proposals of the Principal for altering the scheme of work have been practically adopted by the Benchers. This scheme provides for 240 lectures to be delivered to the first year students, 270 to the second, and 270 to the third. Of these 60 will be moot courts, held for second and third year students, 30 for each. This work being far beyond the power of three lecturers, it became necessary to appoint two additional lecturers to the staff, and Messrs. R. E. Kingsford and P. H. Drayton, the examiners, and formerly lecturers, were appointed. As it is, the work will tax the efforts of the lecturers to the utmost, and we venture to think that the number of lectures will have to be reduced, or else lecturers will have to be employed who will retire from practice.

Mr. Osler, Q.C., has given notice of a motion before Convocation to authorize the building of a school house containing lecture rooms, library and rooms for the Principal and lecturers, to cost $50,000.

Queen's Counsel.

His Excellency, the Governor-General, has been pleased to appoint the following Queen's Counsel:—North-West Territories—William C. Hamilton, Regina; C. C. McCaul, Fort MacLeod. Nova Scotia—W. R. Cutler, Arichat; Geo. Campbell, Israel Longworth and F. A. Laurence, M.P.P., Truro; W. D. Sutherland, Windsor; J. Y. Payzant, F. J. Tremaine, B. Russell, Hon. J. W. Longley, M.P.P., Hon. C. H. Tupper, M.P., R. L. Borden, W. B. Ross, J. N. Lyons, R. C. Weldon, M.P., Halifax; G. H. Elliott, Pictou; J. H. McGillivray, New Glasgow; B. Webster, M.P.P., Kentville; George Bingay, Thomas E. Corning, R. E. Harris, Yarmouth; J. B. Mills, M.P., J. J. Ritchie, Annapolis; J. M. Townshend, W. T. Pipes, A. R. Dickey, M.P., Amherst; F. B. Wade, Bridgewater; A. H. McGillivray, Guysboro'.

REVIEW OF EXCHANGES.

American Law Register.—January, 1890.

The Laws of Louisiana and Their Sources, by Hon. E. T. Merrick.

Ibid.—February, 1890.

Equitable Easements, by Sherrerd Depue. What the learned writer terms easements are generally known as the benefit arising from restrictions imposed by contract or other arrangement upon the buyers of land and enforceable in equity, such as restrictions as to building, etc. A definition given in an American case is "a right without profit which the owner of land has acquired by contract or estoppel, to restrict or regulate for the benefit of his own property, the use and enjoyment of the land of another." They are created generally upon and by the division amongst and conveyance of land to several grantees, and may be by reservation, condition, express covenant, or informal agreement, even parol it is said. The condition must not be in general restraint of trade, or against public weal. If there is a change in the character of the property laid out, the person effecting or assenting to the change cannot enforce the condition or covenant. The restriction must also be for the benefit of the property and not solely for the personal advantage of the original covenantor. The remedy is by injunction against assignees having notice. See the article on Restrictive Covenants, by R. S. Cassels, ante, p. 1.

Ibid.—March, 1890.

Legal Holidays, by John B. Uhle. A number of definitions are cited and criticised. The learned writer distinguishes them from Sundays and defines them thus: "Legal Holidays, as distinguished from the first day of the week, are those days which are set apart by statute, or by executive authority, for fasting and prayer, or thanksgiving or other religious observances and commemorations, or for political, moral, or social duties, or anniversaries, or merely for popular recreation and amusement, under such penalties and prohibition alone as are expressed in positive legislative enactments." Judicial acts performed on such days have been upheld, as well as some ministerial acts, which, however, are apparently voidable.

Ibid.—April, 1890.

Liability of Charitable Associations for Negligence of their Servants, and the Effect of the Motive of a Founder, by Richard C. McMurtrie. A criticism of Mr. Gest's article in 28 Am. L. Reg. 669, in which the learned writer maintains the view that a charity

is none the less a charity in that the motive of the founder may have been a selfish one, and that the fund which in reality belongs to the persons for whom the charity was created cannot be made responsible for the negligent act of one of its administrators. A note in defence of his article is appended by Mr. Gest.

Ibid.—May, 1890.

Christianity and the Common Law, by A. H. Wintersteen. The old cases containing dicta that Christianity is part of the common law are cited, and the learned writer points out that the present understanding is that fulsome, malicious or licentious abuse of Christianity is punishable. He also cites authority to show that it is not part of the law of the United States, though the State Courts have practically arrived at the same conclusion as the English Courts. Disturbance of public worship and like offences are against public order.

American Law Review.—January-February, 1890.

The Provinces of the Written and Unwritten Law, by James C. Carter. A treatise on the impracticability of codifying the law.

The Supreme Court and Inter-State Commerce, by Charles A. Culberson.

Conditional Sales, by Augustus H. Fenn. A vast number of cases are collected. The contracts commonly known under the above name are held to be valid and distinguishable from mortgages. If after partial judgment default is made, the weight of authority is that the purchaser loses what he has paid even when the vendor retakes; but there is authority that if the vendor retakes the consideration fails and the vendee can recover what he has paid.

The Business of the Federal Courts and the Salaries of the Judges, by Albert Dickerman.

The Michigan Central Railroad Conspiracy Trials of 1851, by B. S. Ladd.

THE

CANADIAN LAW TIMES.

AUGUST, 1890.

ONTARIO LEGISLATION, 1890.

ONE would be disappointed, on opening the Ontario statute book for the year, not to find in it legislation touching constitutional matters, jurisdiction of the courts, chattel mortgages and conditional sales, Division Courts, assessment of property, and the Municipal Act—not to speak of mortgages of land, mechanics' liens, and insolvency. And one is never, or seldom, disappointed, though disappointment would not, it must be confessed, weigh heavily. This year we have the usual subjects to discuss in new phases and lights.

The chief characteristic of such legislation is that it produces motion in a circle, not a distinct advance. In the table at the end of the volume, showing Acts repealed or amended, we find no less than forty-five chapters of the Revised Statutes amended, six chapters of the statutes of 1888 amended, and six of 1889 similarly dealt with. Considering the great number of amendments made to the Revised Statutes within three years of the consolidation, one is prompted to ask whether it was really a revision or only a compilation or consolidation. With regard to such amendments as are rendered necessary by an act such as *The Devolution of Estates Act*, by which a clear and striking departure in policy was effected, it can hardly be denied that they disclose an amount of carelessness in passing the original Act which should have been avoided, and that they indicate a lamentable want of thought and foresight. The change by which land is to devolve upon the personal representative instead of the heir, could not fail to produce

a disturbance so widespread as to be almost unlimited. Every phase of it should have been well considered and all necessary amendments, interpretations and declarations made at the time of passing it, so that it might have come into force as a complete enactment, instead of a measure bringing in its train a mass of inconsistencies, necessitating a mass of amendments to be made, not as required, but as they happen to be thought of. The same might be said of other widely operating legislation. It is invariably followed by a host of amendments until it becomes complicated and difficult to understand. However, we cannot hope that our law makers will be much affected by what we say, and we shall therefore depart from general, and apply ourselves to particular, criticism.

The first Act of general importance is chapter 13, entitled "An Act for expediting the decision of constitutional and other provincial questions." It is similar in its main principle to the clause of the Supreme Court Act which permits the Governor-General in Council to refer to the Supreme Court, for hearing and consideration, any matter which he may think fit to refer, but it is far wider in its intended scope and consequences. The Supreme Court Act ends in giving the power to refer a matter and receive the opinion of the Judges; the Act under review provides for other matters which we shall presently consider. The Supreme Court Act has been interpreted by the advisers of the Governor-General to be limited, in intention at any rate, to those cases in which they have to take some public action, and in which they may require advice which is not a matter of policy but rather of constitutional law or perhaps construction, and does not involve private rights; so the number of cases referred to that court has been small and must necessarily be so as long as the ruling upon the interpretation of the clause is adhered to. The Provincial Act, however, provides for more than this, and the question of the efficacy of many of its provisions must necessarily arise if it is to any great extent resorted to. Under it any question affecting the validity of a statute may be submitted and private rights thus be dealt with in the absence of interested

litigants. The delimitation of the constitutional powers of the Legislature by this means is also objectionable as not being either final in its nature or binding upon the Dominion.

The first clause is similar to that already referred to as contained in the Supreme Court Act. By the second section the Court is to certify its opinion and the reasons therefor "which are to be given in like manner as in the case of a judgment in an ordinary action." And any Judge who dissents may certify his opinion in the same way. In case the matter relates to the constitutional validity of any act of the legislature, the Attorney-General of Canada is to be notified of the hearing in order to be heard if he sees fit. Of course the Attorney-General of Canada is not consulted in the framing of the question, he is not entitled to have it submitted to him before setting down and hearing, and though he is to be notified of the hearing he is not bound to attend. There is nothing to oblige him to notify the Attorney-General of the Province that he will not attend, and it is quite within the limits of possibility that a case might come on for hearing with no one represented but the Attorney-General for the Province. Unless the Attorney-General for Canada is comprehended in the terms "any person interested" "any interest" in sections 4 and 5, there is absolutely no power in the Court to direct any one to appear or to concede a hearing to any one on his behalf. And even if he were included in those terms we might well hesitate to say that the Act would be valid in that respect. An Act of the Province designed to compel some person to appear and argue the constitutional limitations of the Dominion Parliament could not possibly be effective, either in its substance or in its consequences. For the Attorney-General of Canada not only may, but ought to, refuse to appear, being responsible not to the legislature of the Province but to his own Parliament; and under such circumstances a decision against the Parliament would not in the slightest degree affect its constitutional rights. For instance, if a case were submitted on the Provincial Act respecting insolvents, and a decision

were given that the Act was valid because the legislature may deal with insolvency, there would be nothing to prevent the Dominion Parliament from passing a law respecting insolvency and directing that it should supersede all other enactments. The question would by no means be settled by the decision; on the contrary an *ex parte* decision would only create doubt and uncertainty instead of certainty.

Sections 4 and 5 provide for persons or classes of persons interested to be heard and for the representation of "any interest" by counsel. There are grave difficulties in the working out of these clauses. Who is a person interested? Who form the class? and what is the interest to be represented? If the question of the validity of the Act respecting precedence at the Bar were to be submitted, as it is broadly hinted it will be, there would be no difficulty in ascertaining the persons or the class of persons interested. But take the case of the Act respecting assignments for creditors, are "creditors" a class within the meaning of the Act? How can they define themselves or be defined for the occasion? Are insolvents a class, and can they receive palpable formation for the purpose of being heard in Court. Pity the sorrows of their counsel! Again, if an Act respecting vagrants should be submitted, are the tramps to be entitled to counsel, or must the criminal class generally be represented? If we assume, however, that a specific person is affected or interested, it could only arise upon a private act; and it is difficult to conceive how a private Act could come before the Court on a case submitted by the Lieutenant-Governor in Council. If a specific class were affected, such as municipal corporations, loan companies, etc., while it would be easy to define the class, it would be difficult, perhaps impossible, to define or select their representatives; and unless there was universal acquiescence or assent upon the delivery of a judgment, there would be nothing to prevent a dissenting member of the class from raising the whole question again. Indeed the whole Act is open to this criticism. For we have it on high authority that the Provincial Legislatures, when act-

ing within their topical jurisdiction are supreme, saving the rights of disallowance and the ultimate rights of the Imperial Parliament. The constitutional validity of their enactments then can only be questioned on the ground that they deal with topics which have not been confided to their jurisdiction. Hence the issue must always be between the Provincial and Dominion authorities, though private rights and private persons must necessarily be affected. If then the Parliament is not bound in a case in which a private person or class of persons is affected, so neither will the decision bind the person or class of persons interested; for he and they are subject to the legislation of the Parliament and must necessarily obey it if it chooses to act. It is an endeavour to enable a man to lift himself over a fence by his bootstraps.

By the sixth clause the decision of the Court is to be deemed a judgment of the Court, and an appeal lies as in the case of a judgment in an action. But will the decision have the other effects of a judgment? How can it? A judgment binds only parties and privies, and who are to be parties or privies? If the Attorney-General of Canada should join in a case, would the Dominion Parliament be bound by his decision? In the case of *The Roman Catholic Separate Schools* (*a*), which was a case submitted under a similar provision, the Government necessarily selected both the counsel, and one of them considered that he did not represent any one, but appeared as *amicus curiæ*.

The Act will probably be ineffectual except to enable the advisers of the Lieutenant-Governor to submit a case and procure an opinion upon it; the opinions will be interesting and no doubt instructive as the reasons are to be given, but they will lack the weight that a judgment carries which is delivered in a hardly contested case in which every effort is made on each side to convince. And although they may have the force of precedents it is easy for a Court to get rid of a precedent if further argument shows it to be wrong or doubtful. The probability also is only too great that in case

(*a*) 18 Ont. R. 606.

a judgment favourable to the Province is given on the question of the validity of an Act, there will be no appeal. For instance, if a case were submitted on the right to appoint Queen's Counsel and a decision in favour of the Province were given, the Attorney-General for Canada declining to appear, we would be just where we commenced. Certainly no one would be inclined to appeal. The dignity is recognized by the Courts, and this is equivalent to a decision. But, it might be said that a formal decision would have weight with the Dominion Government and they would acquiesce. Not necessarily. The Dominion Government have already stated, in a despatch to the Lieutenant-Governor of Ontario, that they consider that the case of *Lenoir* v. *Ritchie* in the Supreme Court is decisive of the sole right of the Dominion to appoint Queen's Counsel. And if the Attorney-General of Ontario does not acquiesce in that decision, the Attorney-General of Canada can hardly be expected to acquiesce in the decision of an inferior Court, which he can easily show to be wrong on an *ex parte* statement of his side of the case, nor will he care to appeal as long as he has, or believes he has the decision of the Supreme Court in his favour.

By chapter 14 the jurisdiction of the High Court and the Court of Chancery with respect to settled estates is confirmed.

Chapter 15 provides for holding a winter sitting for trials in the County of Carleton. The days are to be fixed by the Judges of the High Court or a majority of them; in which respect this enactment differs from the *Judicature Act* which imposes the general duty of fixing the trial days upon the Judges of the Supreme Court of Judicature or a majority of them.

Chapter 16 makes an important change with respect to security for County Court appeals. The bond heretofore required was to be in such sum as the Judge directed, with liberty to pay into Court $400 in lieu thereof, or such other sum as might be ordered. The new enactment fixes the penalty of the bond at $200, with liberty to pay in $100, or less if directed.

Four years have elapsed and the Statutes have been revised since the *Devolution of Estates Act* was passed. And at the expiration of the four years an Act, chapter 17, is passed to amend the *Surrogate Courts Act* so as to make its provisions agree with the law as altered by the *Devolution of Estates Act.* Notwithstanding the important changes made the *Surrogate Courts Act* was left untouched, and in its written terms gave jurisdiction over personalty only. Now the Act is amended by substituting for such expressions as "personal estate," "goods," etc., the term "property," which is intended to include real as well as personal property. Will "property" include "rights and credits" without a special interpretation clause? A man may have a right to recover damages which may survive to his executor, but it could hardly be called "property" before it was reduced to something tangible. Section 20 of the Act declares that where the provisions of the *Surrogate Courts Act* are inconsistent with the *Devolution of Estates Act* the former is to be "taken as amended so as to conform in all respects with the true intent and meaning of the *Devolution of Estates Act.*" The true intent and meaning of the latter Act is not very clear at present; but with relation to the *Surrogate Courts Act* it means presumably that the latter shall be deemed to extend to land as well as personalty. We would be sorry to think another meaning could be attributed to it. For instance, in *Re Mallandine* (*b*), the Chancellor held that an administrator could not sell land, the only adult next of kin objecting, there being no necessity for such a sale in order to pay debts. If the decision is sound and the same rule is to be applied to personalty, purchasers from an administrator or executor may have to beware.

Chapter 18 deals with the jurisdiction of the Courts of General Sessions of the Peace, and County Judge's Criminal Courts. By the first section jurisdiction is taken away from all Courts but the High Court and Courts of Assize, nisi prius, oyer and terminer and general gaol delivery to try "any treason, any felony punishable with death, or any

(*b*) 10 Occ. N. 226.

homicide, or any libel." The jurisdiction of the General Sessions of the Peace was before this very wide, and was said to include all felonies but forgery and perjury; and it did not extend to these two, because it was said they were not provocative of a breach of the peace. See an interesting address by Judge Senkler, *ante* vol. V. p. 398. Section 2 now gives jurisdiction to the General Sessions, County Judge's Criminal Courts and police and stipendiary magistrates to try all offences under sections 28 to 31, of the Revised Act respecting forgery.

The fourth section declares that the power to appoint and dismiss constables shall be exercised at the General Sessions and not at a special session of the justices.

Chapter 19 deals with the security in appeals from the Division Court. The security is to be by bond as in the case of other appeals, with a penalty of $100, and liberty to pay into Court $50 in lieu thereof.

Chapter 21 gives the force of law to the general practice with regard to putting registered and other public documents in evidence. The usual course is to produce the original and leave a copy. The Act provides that so much as is required to be left with the Court on reservation of judgment shall be certified by the officer producing the instrument, and the certified portion shall be marked as an exhibit instead of the original. There is a little awkwardness about getting a ruling from the Judge at the trial as to how much of a document is needed, and then for the first time bespeaking a certified copy, which when procured is to be marked as an exhibit. The former practice by which the copies were procured in anticipation and deposited instead of the original, the latter being formerly produced and proved, was more satisfactory. Now there will be no costs taxed for anything but what is rendered necessary by the direction of the Judge at the trial; and the former course cannot be adopted unless the solicitor is willing to risk his opinion that all and every part of the documents will be required. If there is any question as to the genuineness of the document, and the Judge finds it necessary to retain it, an order is to be made for its reten-

tion and it is to be "marked and filed as heretofore." Deeds produced by registrars have not been marked heretofore, as a rule, nor yet filed; but presumably this will be interpreted to mean "treated as an exhibit."

Chapter 22 professes to give power to commissioners for taking affidavits to take statutory declarations for the purpose of *The Devolution of Estates Act*, or any other Act from time to time in force in this Province. The original Act respecting extra judicial oaths made it a misdemeanor for any one to make an untrue declaration under the statute. Such a declaration had to be made before a "Judge, Justice of the Peace, public notary, or other functionary authorized by law to administer an oath." It has been held that a commissioner for taking affidavits is not a "functionary" within the meaning of the Act, and a person making a false declaration before one cannot be punished under the Act. The fourth section of the Act (R. S. C. 141), especially permits commissioners to take certain affidavits in insurance matters, thus emphasizing the distinction. The questions that arise under the Provincial Act are these: Can the Legislature authorize a commissioner to take a declaration of a kind which owes its existence to and takes effect only by virtue of the Dominion Act? If so, the Dominion Act is invalid. If not, the declarations made before commissioners may possibly be lawful proceedings, but no penalty is attached to the immoral act of making a false declaration. On the whole it would be safer to adhere to the former practice and have all such declarations made before notaries or justices. Nearly every solicitor is a notary, and no proceeding under the *Devolution of Estates Act* goes through without the aid of a solicitor; if the client or deponent is remote from the haunts of solicitors, he is sure to be in the neighbourhood of a justice.

Chapter 23 is a very good specimen of class legislation. It was not long since an Act was passed to enable the Court to make orders for security for costs in actions against newspapers for libel. Now comes an Act to enable the Court to order security in actions against Justices of the Peace.

When it was held in *Re Gilchrist & Island* that a short form of mortgage, by providing for sale under the power without notice lost the meaning given it by the long form, such securities could not be realized by selling under the power when they got into the hands of an assignee. The decision was not received with satisfaction, nor did it meet with universal assent. It was subsequently doubted and the general impression was that it would some day be overruled. Chapter 27 of the statutes under review provides for such cases, and in the usual inartificial manner. It declares that in such a case "the mortgagee, his heirs, executors, administrators or assigns" may sell under part two of the Mortgage Act which provides a statutory power of sale for mortgages containing none. It was unnecessary to make this provision for the mortgagee, because the decision did not affect him further than to declare that he had a power of sale in so far as the bare words of the short form would admit of it. It is in form sufficient if the mortgagee proceeds prudently. It was not only unnecessary, but decidedly improper to mention the heirs; for unless there is something in the true intent and meaning of the *Devolution of Estates Act* not yet discovered, the heir's day is gone. And at any rate he had and has nothing to do with the securities which pass to the personal representative. The latter, or an assignee by conveyance of the mortgage, may now proceed under the Mortgage Act; but the proceedings are too slow to make them very valuable. Considering the inconvenience attendant upon the decision in *Re Gilchrist & Island*, it would have been more to the purpose to have amended the Act respecting short forms so as to make it more elastic in the place in which it was said to be too rigid to permit a sale without notice.

The grant of letters of administration to the estate of a living person is a circumstance rare enough in its happening to be of striking interest when it does happen. And so there are many reports of cases in which the validity of the letters and of the acts done thereunder have been questioned. The almost uniform course of decision in the United States is for the absolute nullity of the letters on the ground of

want of jurisdiction, the Courts of Probate having jurisdiction to grant letters only in the case of death. The New York Court of Appeals holds the contrary view by a majority decision. Perhaps no decisions so uniform have been so persistently criticized from an adverse point of view. The line of argument taken against them is shortly this:—Had the Court authority to adjudicate upon the merits? If so the conclusion must be valid as a decree of the Court unreversed, and therefore every act done under the decree must be valid. No judgment can be collaterally attacked on the merits; and as the Court had jurisdiction to find the fact of death, the merits in so far as finding the fact of death is concerned, have been conclusively adjudicated upon, and the judgment is unimpeachable. As a general rule, no doubt, protection is afforded to those who do certain acts under the judgment of a Court, because they are compellable. But it does not follow that everything done under a wrong judgment is valid. Where there is a reference to a Master, and the successful party proceeds with the reference pending an appeal or during the period before the time for appealing elapses, he proceeds at his risk, and if the judgment be subsequently reversed his proceedings are absolutely null and void. The jurisdiction of Probate Courts depends, however, to such a great extent upon local statutes that it is dangerous to treat any decision or number of decisions as adjudications upon principle (*c*). The matter is now set at rest in Ontario by chapter 29 of the statutes under review. The first section makes valid all acts done by a person appointed administrator to the estate, or to whom probate is granted of the will, of any person presumed to be dead in case it transpires that the presumption was erroneous; gives the right to the person erroneously supposed to be dead to recover from the executor or administrator any portion of the estate undistributed, and subject to the provisions of the Statute of Limitations, to recover from the next of kin, devisee, legatee or heir the portion received. The second section provides for cases of sup-

(*c*) Reference may be made to essays in the following: 14 Am. L. Rev. 337; 22 Cent. L. J. 484; 21 Alb. L. J. 65.

posed intestacy, and the admission to probate of a document not the last will. The provisions are the same *mutatis mutandis* as those contained in the first section. Nothing, however, in the Act is to protect any person acting fraudulently. The Act is apparently retrospective.

An Act to provide for the vacating of certificates of *lis pendens*, chapter 33, permits the Court or a Judge to remove such certificates in certain cases. Heretofore, such certificates have been treated as simply alleging a certain fact, namely, that an action is pending in which the title to land is called in question, and the termination of the litigation is the only mode of disposing of them (*d*). The consequence was that where in an action affecting the title to land, a certificate of *lis pendens* was registered, however frivolous or untenable the plaintiff's claim might be, the defendant's only redress was to speed the proceedings and bear the loss. The present Act is designed to remedy this, and in it two classes of cases are recognized. By the first section the Court is empowered in any case in which the litigation is not in good faith prosecuted, to vacate the certificate, and by the second section power is given to vacate it when the object is not to recover the land itself but to hold it as security for some other claim, and other security is substituted.

In the first class of cases, which in fact embraces all actions of whatever nature in which there has been undue delay, the Court has now power, in addition to its inherent power to speed the litigation, to vacate the *lis pendens*, thus in some instances, no doubt, practically ending the dispute, unless the right to damages exists. In the second class, namely, where the land is held as security for a claim, the Court may order security in lieu of the land to be given and allow the land to go free. Thus in one case the Court allowed land to be sold in order to effect an advantageous sale, and dissolved an injunction for that purpose (*e*). The effect of registering a *lis pendens* is equivalent to granting an injunction, and the new Act permits the Court to deal as advantageously with the land, while protecting the

(*d*) See *Sheppard* v. *Kennedy*, 10 P. R. 242; *Foster* v. *Moore*, 11 P. R. 447.
(*e*) *Hadley* v. *London Bank of Scotland*, 3 D. J. & S. 63.

plaintiff, as it could if the land were held under an injunction.

Chapter 35 provides for the case of chattel mortgages made by incorporated companies to secure their bond-holders. Such instruments being necessarily made to one or more trustees for all the bond-holders the rigid affidavit required by the Chattel Mortgage Act could not be made. This Act provides for the affidavit being made by the mortgagee or one of the mortgagees. "Mortgagee" here must be interpreted as trustee-mortgagee, *i.e.*, the person to whom the mortgage is made. All the bond-holders, being entitled to the security of the mortgage, are mortgagees, but the purpose of the Act is to enable the mortgagee having the legal conveyance to act as mortgagee for the purpose of the Act. His power to so act is extended to renewals. And the time for filing is extended from five to thirty days when the head office of the company making the mortgage is not within Ontario. But suppose the trustee to whom the mortgage is made is not within Ontario. He may not be able to make the affidavit within five days. Provision should have been made for this.

An Act to simplify the procedure for enforcing mechanics' liens, chapter 37, may possibly do so; but, on the other hand, the experience of the working of the Act may not justify the title. The present mode of proceeding is not interfered with, except as to costs, but the procedure provided by this Act may be resorted to as an alternative. The proceedings are commenced by filing "a statement of claim in the office of a master or official referee having jurisdiction in the county wherein the lands in question are situate," to be verified by affidavit, upon which the master or referee is to issue a certificate in duplicate of the filing of the same. This certificate is to be registered as a *lis pendens*. It is noticeable that we are left in doubt as to whether "statement of claim" bears the technical meaning given it by the *Judicature Act* (the proceeding is "deemed" to be an action: sec. 38), or simply an allegation of the claim made set out in writing. If the former, then there must be certain persons selected by the claimant and made parties

to the proceeding. If the latter, there is nothing to indicate that the claimant must choose whom he will join. In either case, it may possibly be that the claimant is safe, notwithstanding that he is wrong in joining or not joining parties; for the fourth section declares that upon the registration of the certificate "the action shall be deemed to have been commenced as against the owner and all other necessary parties to the action." Though section 6 requires the claim to be served on all proper parties, if the action is pending against all necessary parties by mere registration of the certificate, the plaintiff or claimant may always serve one who is a necessary party, at any time within the period allowed for serving a writ, notwithstanding that he is not named in the claim. The doubt and confusion that may arise from this could have been avoided by directly requiring the plaintiff or claimant to add those parties whom he deems necessary.

As regards the nature of the proceedings we are left in doubt as to whether the plaintiff is entitled to judgment for the debt if he cannot establish a lien, or whether the intention was simply to obtain satisfaction of the lien by sale. After a provision for "disputing the plaintiff's right to a lien" which appears to mean simply trying the question whether a lien exists, the Act proceeds with directions as to taking accounts, and making a report. By the thirteenth section the master is empowered to direct the amount found due to be paid into Court. By the twentieth section, if default is made in payment of the amount found due by the owner, the plaintiff may apply *ex parte* to the master or referee, who, on proof of the default "may issue a judgment for the sale of the land in question for the satisfaction of the lien of the plaintiff and other liens of the same class." So far, no power is given to award payment by the debtor personally, so as to enable the plaintiff to have execution for the amount of the claim; and the form of judgment, which is for sale only, bears this out. By the thirtieth section, "after the amount of the lien shall be realized" any lienholder who has proved a claim may apply to the master upon notice to his primary debtor "for

judgment for the payment of any balance which may remain due after deducting the amount received or payable in respect of the lien." This is sufficiently obscure to require an arbitrary decision to give it a meaning. If the amount of the lien is realized, how can there be a balance? One would have expected to find that if there was a balance due after applying the proceeds of the sale, judgment might be given therefor; but if the sale realized the amount of the lien, one would suppose that to be the end. Can it mean that if a party has a lien for part only of the amount due him, and the lien is satisfied, he may have judgment for the balance for which there is no lien? No light is thrown upon this by the form of certificate for judgment given. The master may refuse the application for judgment; why, if there is a balance due? If granted, the certificate is taken to the proper officer at the High Court, County Court, or Division Court, according to the amount, and judgment is entered there for the debt.

The consideration of this becomes important if the owner retains the perceutage required by the Act to meet such liens as may be registered. In such a case the owner has done all that he is bound to do, and no person is entitled to charge the property with the amount due him. The whole Act proceeds upon the assumption that there is a valid lien and that it will be satisfied by sale. Apparently the only manner in which the Act can be worked out where the owner retains the percentage is for him to submit to the proceedings admitting the claim, and the lien too for that matter, and relying upon the master to relieve him from costs on his paying the money into Court pursuant to the report. For all the good that this legislation has done to workmen it would bear repealing altogether.

The chief feature of the Act is that it relegates to a master or referee the decision of some of the most intricate questions that the Courts have had to deal with, namely, the interpretation of the Mechanics' Lien Act in all the various lights which it presents from time to time. True, the right of appeal is given; but it increases vexation, by placing the matter to be decided one step backward in the

race to the Court of Appeal. Appeals from the Master are to be taken to a Judge in Chambers, by section 35, as if from an order of a local Judge.

An important feature is the provision that the costs are not to exceed twenty-five per cent. of the "amount realized." It is well to reduce costs for the public benefit, but where the proceedings are apparently more lengthy or vexatious, this is an injustice to those who are called upon to do the work. It is quite possible that a solicitor may have to disburse more than twenty-five per cent. of the amount realized, if he proceeds under section 23 to sell according to the consolidated rules, and yet there is no power to allow him to recover more than the twenty-five per cent., either from opposite party or his own client. He cannot avoid this by bringing an action in the High Court, for no more costs could be recovered by this proceeding unless the Court orders it. No greater incentive could be devised to impose hard bargains on a client than to put the solicitor in the position of risking all his efforts upon the possibility of the favorable sale of a piece of land. The folly of the workman or material man, the dishonesty of the contractor or owner, the mistakes or misapprehensions of all them, are to be paid for by a solicitor who is to do his best to establish a lien and satisfy it, and then be restricted as to the amount recoverable, not by a fair test as the value of his services, but by the possible result of a sale. Suppose the land will not sell at all. If the defendant succeeds, however, as far as one can judge, by section 15, he is entitled to get his costs in full; and in such case, there being nothing said as to the plaintiff's costs, we presume the solicitor may recover his full costs from his client in the usual way. Under such circumstances it will be better for the plaintiff's solicitor that his client should fail altogether, than that he should be successful and only realize a small portion of his claim on account of the scanty security of the land.

Other features of the Act are that the statement of claim is not filed where pleadings are usually filed; that though the proceeding is an "action," no provision is made for plead-

ings by the defendant, and no provision is made for production, examination of parties, etc., unless by reason of its being an "action" all the rules as to procedure apply; though a motion may be made to dismiss for want of prosecution (sec. 27), there is nothing to indicate what due prosecution is, and the rules of practice are not practically applicable; and if the parties are to take the ordinary proceedings in what office must they be taken. It is also noticeable that as the plaintiff is not bound to issue a writ he may assign his proceeding to any division of the High Court that he pleases.

The next Act makes a further modification of the Mechanics' Lien Act, by requiring the owner, in the absence of a stipulation to the contrary to retain fifteen per cent. of the price where it does not exceed $1,000, twelve and a-half per cent. where it exceeds $1,000 but does not exceed $5,000; and in all other cases ten per cent. of the price to be paid the contractor.

An important provision is made by chapter 89 which affects insurance for wives and children. The original Act R. S. O. c. 136, sec. 6, provides for the case of insurance effected by a married man, and declares it free from his creditors. It required a judicial decision (*i*) to wake up the profession to the fact that an insurance effected by a man when a bachelor and endorsed to his wife after marriage did not come within the Act, and consequently went to his administrator and not his widow at his death. The present Act provides that a married man may endorse his policies existing at his marriage under the Act. Other provisions are for enabling a man to effect an insurance for his "future wife and children." So, a woman may with the same effect insure for her husband and children; and any person may insure for his or her mother.

The Municipal Amendment Act, 1890, chapter 50, contains as usual a number of alterations of this important Act. The most important feature of general application is the consolidation and amendment of the clauses

(*i*) *Tor. Gen. Trusts Co.* v. *Sewell*, 17 Ont. R. 442.

respecting local improvements. By successive amendments these clauses had become very complicated and in some parts very obscure. It was only by inference and exception that the different modes of initiating local improvewere to be arrived at instead of by direct enactment. The consolidation sets out in distinct paragraphs the several modes, and under each head the definite proceedings. If we might venture to express an opinion we think that the Act in this respect might have been made even simpler and more plain by reducing the language to more concise form.

EDITORIAL REVIEW.

Concise Reporting.

The following account of a case taken from a minute in the Registrar's book, and cited in a note at 3 Mad. 529, is a model of concise though quaint reporting. Sir Thomas Powis' argument is heard very often now-a-days, and those who use it are recommended to adopt his abbreviated style for the relief of the Courts and the general good of humanity. The case can hardly be said to be instructive, but that quality is not always a feature of reported cases at the present day, and we do not hesitate to recommend the style (save the spelling) to the reporting staff for a large proportion of cases. This is the minute.

Sir Thomas Powis prays an Injunction to stay Waistes. An Affidavit read.

Vernon p' Questioner.

Dobbins p' Defendant.—We are in Tenant in Tail after possibility of Issue extinct, and it hath been adjudged in this Court that they could not be constrayned. 11 Hen. VII.

Pooley p' Defendant.—We are Tenant in Tail after possibility, etc., and they would have this Court doe what they refused to doe.

Wright for Defendant.

Sir Thomas Powis p' Questioner.—Doe hope this Court will interpose, that they commit no waiste, and that the cause shall be heard.

Vernon, the Question doth not come up to the Precedents cited by the defendant.

The articles read.

Cur.—Take an Injunction to stay any willfull Waiste in defacing the scite of the Mansion House, but noe other Injunction.

Cur.—Take an Injunction to stay any Willfull Waiste in any of the houses.

Ingenuous Ingenuity.

The Green Bag for July states, as a fact, that the answer given by a law student to the question, What is an accommodation note? was, One which the maker doesn't have to pay until he is ready to. Actual fact is said to be stranger than fiction, and is often much more humorous on account of its reality. While we cheerfully agree that this answer is one of the funniest on record, (and submit that daily experience lends to it the similitude of truth), we tender the following, also actual facts, for the consideration of those who read the vacation issues of this humble periodical. If anything more innocently ingenious can be produced let it be produced. If the gentlemen who originated the answers chance to see them reproduced, let them not be offended, for they have written two of the most humorous things of the century.

Question.—Explain the maxim, *Falsa demonstratio non nocet.*

Ans.—If I shake my fist at a man who is within my reach that is an assault though I do not touch him, because he is within reach and I may carry out my threat and hurt him. But if he is across the street, and so out of my reach, that is not an assault, for *falsa demonstratio non nocet.*

Question.—What duty does the owner of premises owe to one whom he invites to come upon the premises?

Answer.—The duty of lateral support.

BOOK REVIEWS.

The Judicature Act of Ontario, and the Consolidated Rules of Practice and Procedure of the Supreme Court of Judicature for Ontario, with practical notes. By GEORGE SMITH HOLMESTED, Barrister-at-Law and Registrar of the Chancery Division of the High Court of Justice, and THOMAS LANGTON, M.A., LL.B., one of Her Majesty's Counsel. Toronto: Carswell & Co., 1890.

This work is practically speaking a consolidation of the other works of Messrs. Holmested and Langton on the Common Law Rules, Chancery Orders, and Judicature Rules. The size to which the volume of Consolidated Rules is swollen by the introduction of notes promises well for the amount of information afforded by this edition. A work of this kind must prove its own usefulness by actual experience of its contents, and from the character of its predecessors we are, we think, justified in saying that we have now the most complete and useful practice book ever issued in Ontario.

History of the Court of Chancery and the Rise and Development of the Doctrines of Equity. By A. H. MARSH, one of Her Majesty's Counsel. Toronto: Carswell & Co., 1890.

Mr. Marsh, Q.C., whose able contributions to this journal are well known, has published in book form the substance of his lectures in the Law School last winter on the growth of the Court of Chancery. From its source to its summit, from the days of its interference with the rigid course of law to the days of its final triumph by means of the Judicature Act, the history of Equity is written in concise and entertaining form. Its peculiarities, its characteristics, its benefits and its oddities are set out; and on the whole

there is a great deal of instruction to be found mixed with a great deal of amusement.

We have heard of hanging round the neck of a dog a chicken which he has killed, by way of infusing a feeling of disgust into the brute for his misconduct; but never till the writer opened this book did he hear of hanging a scandalous and impertinent pleading round the neck of the pleader. That must be because he had not read Spence's book. Mr. Marsh cites from it such a case.

REVIEW OF EXCHANGES.

American Law Review.—March-April, 1890.

American Law concerning Employer's Liability, by JOHN F. DILLON. A statement of the law, as between employer and public, and master and servant, concerning liability for torts.

Crimes Against Criminals, by ROBERT G. INGERSOLL. Concerning the cruelty of punishments, and the want of discrimination in imposing them. It is suggested that the Legislature should fix the amount of land that a private citizen should own, and that an owner of more than the prescribed amount should be compelled to sell when asked.

The True Method of Legal Education, by GEORGE H. SMITH. The learned writer thinks that neither the system of teaching from text books nor that of teaching from cases presents any hope of favourable results.

The Proposed German Civil Code, by ERNEST FREUND.

Codification—Mr. Field's Answer to Mr. Carter, by DAVID DUDLEY FIELD.

A Lawyer's Address to a Lay Audience, by HON. HENRY C. CALDWELL.

How the Supreme Court of Tennessee Cleared its Docket, by JNO. DICKINSON.

Central Law Journal.—14th February, 1890.

Arbitration, Incidental to Contracts of Insurance, by M. C. PHILLIPS. A few notes on the arbitration clauses of policies.

The Nullity of Protective Law, by R. S. MORRISON. The constitution of New York provides that cruel and unusual punishments shall not be inflicted. The learned writer thinks a decision wrong which declares death by electricity not to be unusual though it was unheard of when the constitution was framed.

Ibid.—7th March, 1890.

The Element of Time in Contracts for the Sale of Chattels, by C. R. PENCE. A distinction is drawn between cases in which no property passes at the time of the making of the contract and those in which it does pass.. In the latter case the vendor cannot revest the property for non-payment on time except by express agreement.

Ibid.—14th March, 1890.

Who May be Executors or Administrators, by NATHAN NEWWARF. American and some English cases are cited.

Ibid.—21st March, 1890.

Impeachment of Witnesses on the Ground of Character, by T. A. PALLEYS. A witness' veracity may not be impeached by showing immorality in other respects. When the character for chastity is at issue the prosecuting witness' character may be inquired into.

Ibid.—28th March, 1890.

Comity of Nations, by JAMES M. KERR. The subject is discussed under the heading of Decisions of Courts and Construction of Statutes, Foreign Corporations, Rights of Married Women, Bankrupt Laws, etc.

Ibid.—4th April, 1890.

Special Assessment and Special Taxation, Nature of, by D. H. PINGREY. Where charters are granted or laws passed containing exemptions from taxation, it has generally been held that general taxation for revenue, etc., is meant, and not special taxation as by the local improvement system.

Ibid.—18th April, 1890.

Remedies for Improper Expulsion and Suspension from Societies and Fraternities, by EUGENE MCQUILLIN. English and American cases are cited.

Ibid.—25th April, 1890.

Charitable Corporations, by CHAS. CLAFLIN ALLEN. Some remarks in the qualifying adjective of the title as defining the class of corporations entitled to recognition.

THE

CANADIAN LAW TIMES.

SEPTEMBER, 1890.

THE SALARIES OF THE JUDICIARY.

DURING the session of 1889 the Parliament of Canada was asked, on the recommendation of the Crown, to consider certain resolutions increasing the salaries of the Judges of the Provincial Courts, and agreed to do so. But after remaining on the order paper from the 18th March to the 30th April, the Minister of Justice announced to the House and the country, that the Government would only proceed with so much of the resolutions as related to the additional Superior Court Judges for Quebec, and the additional County Court Judges for British Columbia; and added that he was "unable to proceed with the other provisions in consequence of the general expression of opinion of the House." To a non-political observer this negative of the action of the Crown seems to establish an anomalous precedent, which may become inconvenient hereafter. By advising the measure which the Crown recommended to Parliament, and then negativing the action of the Crown without a vote of the House of Commons, the Executive committed the Crown to what appears to be a constitutional blunder, if it does not contain some of the qualities of breach of faith.

The Minister must have had some other than a public expression of this opinion of the House, for *Hansard* contains no reports of any speeches on the subject between the dates given above (*a*).

(*a*) It is rumoured that the alleged "opinion of the House," was the vote of an institution (caucus) not recognized by the Constitution.

We are therefore unable to consider the argumentative or convincing force of the reasons which caused this change in the agreed policy of the Government, and more especially as the same Government had in former Parliaments and sessions pledged itself to deal with the general question of judicial salaries.

The B. N. A. Act vests in each Provincial Legislature exclusive power to make laws respecting "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts." But another provision takes from the Provincial Executive the appointment of the Judges of all their courts, and vests it in the Dominion Executive, and provides that "the salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts, shall be fixed and provided by the Parliament of Canada." This duplex jurisdiction is anomalous, and has led to some, and may yet lead to serious, friction, and it cannot be defended as desirable or necessary to the protection of the commonwealth. A time may come when a province may establish new courts, or authorize the appointment of additional Judges, which the Dominion may ignore. Or the Province may abolish certain courts, either because their jurisdiction can be properly vested in others; or because unfit or unacceptable Judges have been appointed by the Dominion Executive,—thus leaving salaried Judges chargeable on the Dominion revenue with no courts to preside over, and therefore "nothing to do (*b*)."

Before such possibilities may become realities, it would be wise to mature and apply some constitutional remedy.

But in executing this legislative power to fix judicial salaries, we must concede that the Parliament of Canada has adopted a policy peculiarly its own, and which stands in marked contrast with the more judicious policy as well

(*b*) Such an event occurred in the United States in 1802, when Congress abolished certain courts which it had previously established, and over which the Executive had appointed Judges.

as universal practice which seems to prevail in the other self-governed colonies (*c*).

An observant reader comparing the amounts of the judicial salaries paid by each of the other self-governing colonies with the amount at which such salaries are fixed in Canada, will be able to realize that the general policy of the Parliament of Canada is to vote (at least for Ontario) the *minimum* of remuneration for the *maximum* of trained legal ability, and judicial responsibility. This policy is equally apparent in the salaries voted to the chief and other responsible Ministers of all our Governments, Dominion as well as Provincial. Why it is so appears an unsolved mystery to the politicians and people of other communities. When Canadian matters are talked of in kindred lands, the marked success of the Canadian Federal system of government, and the vigorous and hardy energy and great enterprises of the Canadian people, are referred to with expressions of commendation and words of sincere congratulation and praise, which may well stir our national pride; but when the political and judicial salaries are touched upon, they elicit only surprise or disappointment, or a sarcastic allusion to the salaries of the Athenian *Dicasts* (*d*).

The more liberal policy respecting salaries which is characteristic of the other self-governing colonies, may be instanced as so many fraternal legislative rebukes of the

(*c*) A legal contemporary gives the following schedule of judicial salaries in the colonies enjoying "responsible government:"

Colony.	Population.	Prime Minister.	Chief Justice.	Puisne Justices.
Victoria.....	1,104,288	$10,000	$17,500	$15,000
New South Wales...	1,042,919	10,000	17,500	13,000
Queensland.....	387,463	6,500	12,500	10,000
South Australia....	318,308	5,000	10,000	8,500
New Zealand.....	649,349	5,000	8,500	7,500
Tasmania.....	146,149	5,500	7,500	6,000
Cape Colony.....	1,428,700	8,750	10,000	7,500 & 8,750
Natal.....	48,361	5,000	7,500	5,000

(*d*) The pay of an Athenian *dicastes*, (a judicial officer similar to the Roman *judex*), was only 3 *oboli* per day. Even this small salary, it seems, did not deter the politicians of those days from devising a policy of parsimony in judicial salaries, which has been thus outlined: "The public authorities of Athens employed every possible means to prevent the sitting of the Courts, in order that the State *might not be compelled to expend so much money* on the wages of the Dicasts:" *Bœckh's Public Economy of Athens*, p. 237.

parsimonious policy of the Dominion in the matter of judicial, as well as political salaries. And their practice in determining the relative proportions of ministerial and judicial salaries may also be cited as indicating a larger and more just appreciation of the higher value and responsible functions of the judicial department of their colonial governments.

But in Canada a larger power, as well as a more delicate duty, is vested in our judges, not given to or exercised by the judiciary of any other portion of the British Empire, with the single exception perhaps of India. The B. N. A. Act has established two separate and independent legislative and executive sovereignties, with enumerated and therefore limited powers (*e*). Each separate sovereignty derives its legislative authority from the same constitutional instrument, and each though within the same territorial limits has distinct and defined powers which prohibit one from encroaching upon the exclusive legislative functions of the other (*f*). The responsible and delicate duty of defining the limits of this intricate exclusive legislative and executive authority, and of enforcing the constitutional prohibition, are cast upon our Canadian Judges. It has been well observed by a sagacious writer that under a constitution which prescribes and limits the rights of rulers and legislators, there is a tendency in each of the legislative powers to grasp or absorb the rights of the other bodies, and to gain a predominating power. Legislative conflicts therefore must necessarily arise between the Constitutional Act and the laws of the Federal Parliament, or the laws of the Provincial Legislatures, which must be submitted to the

(*e*) The colonial legislatures within the restrictions necessarily arising from their dependency on Great Britain, are *sovereign* within the limits of their respective territories: *Story on the Constitution*, s. 171. The States of the American Union are sovereign within their respective boundaries, save that portion of power which they have granted to the Federal Government, and foreign to each other for all but federal purposes: *Rhode Island* v. *Massachusetts*, 12 Peters U. S. 720.

(*f*) The Federal Government and the States, although both exist, and exercise their functions within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective governmental spheres, as if the boundary line of division was traced by landmarks and monuments visible to the eye: *Ableman* v. *Booth*, 21 How. (U.S.) 506.

arbitrament of an independent and competent authority. Of necessity, by virtue of their judicial function of interpreting the laws, the higher duty of ascertaining whether a special law is within the legislative authority of the enacting power, and therefore conformable to the Constitution, falls upon our superior Courts; and if found by them to be *ultra vires*, they have to declare it void and inoperative. Upon this controlling judicial power rests in great measure the safety of the Confederation; and thus in a most real sense our judiciary become the authority specially responsible that the laws of the whole be not in continual danger of being contravened or encroached upon by the parts, or the converse. And although our Confederation is not yet a quarter of a century old, the legislative lines of our Constitution have been fairly and clearly drawn and faithfully outlined in the well-reasoned judgments and well-applied constitutional principles which are to be found in the decisions of our Judges.

Public servants will occasionally agitate for an increase of salary; and some if they give extra time to the public service, beyond the official hours, will receive from the Executive and Parliament extra pay or allowances. Our Judges, however, have no such limit of official hours, and cannot and do not violate judicial propriety by invoking any political or newspaper influences on their behalf; and are therefore allowed to sustain their positions as best they can, and to submit to financial cares, until some sense of public justice is aroused and realizes the duty of the community to provide a proper remuneration for their services. Other salaried personages are free to influence public opinion in such matters; but judges cannot, and are left to administer their onerous and constantly increasing judicial duties at salaries which were settled at a date since which there has been a great increase in the cost of living—especially in our larger cities; although it is well known to the Dominion Executive and Parliament that professional fees have been largely increased, and that the salaries of the managers of our banks and commercial companies and mercantile firms have been largely augmented since 1873.

In adjusting the proportionate charges on the public revenue for judicial salaries in each of the Provinces, it would seem that the statutory and constitutional rule expressly affirmed by the B. N. A. Act has not been observed in fixing the financial charge for this branch of the Provincial service.

The B. N. A. Act grants the Provinces subsidies from the Dominion "for the support of their Governments and Legislatures;" and but for the express provision in section 100 before referred to, the salaries of the Provincial Judges who form a part of the Provincial Government (*g*), would be payable by the Provinces out of their subsidies and other revenues. The charge therefore of these Provincial salaries on the Dominion is in the nature of an additional Provincial subsidy, and is therefore clearly within the policy, if not the letter, of the constitutional and statutory rule prescribed by section 118 of the B. N. A Act, and the subsequent Acts of the Parliament of Canada, by which the Provincial subsidies are required to be proportionate to the populations of the Provinces.

For some of the purposes of the Federal union, Quebec has been made the constitutional factor, especially for determining the representative power of each Province in the Dominion; and acknowledging the propriety and submissive to the binding force of this policy of the constitution, it would be proper to take the ratio of Quebec's charge on the Dominion revenue for judicial salaries, as the financial factor for determining the proportionate and just allowance to which each of the Provinces is entitled, according to its population, for this service.

Since Confederation, Quebec has added more Judges to her judicial staff than any of the other Provinces. This was perhaps necessary owing to her system of judicature providing for no County Courts, technically so called, which the other Provinces had, or subsequently estab-

(*g*) There are three great departments of Government, the Legislative, the Executive and the Judicial. The first is to pass laws, the second to approve and execute them, and the third to expound and enforce them: *Martin* v. *Hunter*, 1 Wheat. N. S. 550.

lished. This addition to her judicial staff has necessitated a much heavier proportionate charge on the Dominion revenue in favour of Quebec, than is sanctioned for the other Provinces. At Confederation, Quebec had in all her Courts 23 Judges whose salaries amounted to $84,800. In 1890 she had increased her judiciary to 37 Judges whose aggregate salaries amount to $168,000, an increase of $83,200, or nearly 100 per cent. In 1867 Ontario had 10 Superior and 36 County Court Judges, whose total salaries amounted to $125,000. At the beginning of 1890 she had 14 Superior Court Judges and 56 County Court Judges (the increase being chiefly in Junior County Judges), whose aggregate salaries amounted to $199,200 or an increase of $74,200 since 1867, or about 60 per cent.

Tabulating the charge on the revenue for judicial salaries in each of the Provinces, on the basis of the population in 1890 as estimated by the Dominion Department of Agriculture, gives the following per centage of charge in each Province (*h*) :—

Province.	Population.	Superior Courts. No. of Judges.	Superior Courts. Salaries.	County Courts. No. of Judges	County Courts. Salaries.	Total.	Per Centage. Charge.
Ontario.....	2,223,975	14	$ 74,000	55	$ 125,200†	$199,200	8.95
Quebec.....	1,513,616	37	168,000†	None		168,000	11.09
Nova Scotia...	496,103	7	29,600†	7	14,000	43,600	8.76
N. Brunswick	351,875	6	25,000	6	15,600†	40,600	11.53
P. E. Island..	123,551	3	10,400	3	7,200	17,600	14.24
Manitoba.....	161,927	4	17,000	4	9,600	26,600	16.42
B. Columbia..	173,566	5	22,670	4	9,600	32,270	12.83

Taking the Province of Quebec as furnishing the proper and appropriate ratio of charge on the Dominion for a

(*h*) If the official census of 1881 is taken as a basis, the per centage ratio would be as follows:—

Province.	Population.	Total Judges' salaries.	Per centage charge.
Ontario.....	1,923,228	$199,200	10.35
Quebec.....	1,359,027	168,000	12.36
Nova Scotia.....	440,572	43,600	9.90
New Brunswick.....	321,233	40,600	12.63
Prince Edward Island...	108,891	17,600	16.16
Manitoba.....	65,954	26,600	40.33
British Columbia.....	49,459	32,270	65.24

† This includes the charges for the Maritime Court in the Province.

supplementary Provincial subsidy for these judicial salaries, it is obvious that neither Ontario nor Nova Scotia receive their just or proper or proportionate allowance from the Dominion for the support of the judicial department of their Provincial Governments. Quebec's allowance or charge for judicial salaries gives a ratio of 11.09 according to her present estimated population. But if the census of 1881 is considered more accurate, then her ratio would be higher, or 12.36. If then Ontario and Nova Scotia are conceded the same justice, and are entitled to the same ratio of allowance from the Dominion, Ontario should receive a yearly grant of $246,638 or $47,438 *more* than is now voted to her for the salaries of her Judges. Nova Scotia, if similarly entitled, should receive from the Dominion $11,417 *more* than the present allowance for her judicial salaries. But if the population of Quebec in 1881 is to fix the ratio ($12.36) Ontario's extra allowance would be $38,511, and Nova Scotia's $10,854. This re-adjustment of the grants for judicial salaries, based on the Quebec allowance and the constitutional rule as to subsidies, would easily prove sufficient for the addition of $1,000 to the salary of each of the Superior Court Judges in these Provinces, proposed by the Government in 1889; and the balance could be distributed so as to grant a graded and reasonable increase of salary to their County Court Judges, based upon the expensiveness of the locality and the amount of judicial work; and would enable Parliament to grade their salaries according to some more just and equitable rate of remuneration than they are at present regulated by.

It is with some feeling of reproach we have to refer to a great wrong which was done to the Justices of the Court of Appeal in 1883, when their salaries were reduced, in violation of a well recognized constitutional rule which was law in Canada at the time of their appointment, and against which wrong no political or professional voice was then raised in Parliament, or in the Convocation of the Law Society. By the Ontario Act of 1874 (37 Vict. c. 7) it was made imperative on the Justices of Appeal to go circuit, and hold Courts of Assize throughout the Province; but, on the re-

vision of the statutes this duty was made permissive; and in obedience to the law these justices went circuit and held courts as did the other judges. The Dominion acknowledged their duty to go on circuit, and under 32 & 33 Vict. c. 8, (D), recognized their right to, and paid them the usual circuit allowance of, $100 for each Assize outside of Toronto. Practically these circuit allowances became part of their salaries, less the actual cost of their travelling and other expenses on circuit.

The Provincial Legislature, which has exclusive power to regulate the jurisdiction of the courts and prescribe the duties of the Judges, has thought proper to continue the provision of the law authorizing the Justices of Appeal to go circuit. (R. S. O. 1887, c. 44, s. 8.) But notwithstanding the legislative action of Ontario, the Parliament of Canada in 1883 passed an Act (46 Vict. c. 9, s. 7) providing that from and after the 2nd July, 1884, "no travelling or circuit allowances shall be paid to the Judges of the Court of Appeal in Ontario," thus compelling them, should they comply with the Ontario law and go circuit, to do so and pay all their travelling and circuit expenses out of their salaries.

In moving the resolutions in Parliament on which the Act was founded, the Minister said: "We provide the salary, and if the allowance is part of the salary we have something to say about it." Mr. Blake, the leader of the Opposition, after calling attention to the inadequate salaries then received by the Judges in Ontario, pointed out that the proposal of the Minister was "a positive provision for a reduction in the salaries of the Judges in the Court of Appeal."

In reply, Sir John A. Macdonald admitted it was so, and added: "But I think the hon. gentleman will agree in the opinion that if the salaries of the Judges of the Court of Appeal are insufficient, the proper course would be to increase them, and keep the Judges in their own court; that, even if we did not add to the salaries of the other Judges, *the Judges of Appeal should get an additional*

salary in lieu of the circuit allowances they give up." (*Commons Debates*, 1883, p. 1316).

The constitutional right of Parliament to reduce the salaries of Judges during the continuance of their commissions, was not then questioned or considered, though an Imperial statute (1 George III. c. 23, s. 3), in force as part of the Constitution of Canada when the Justices of Appeal were appointed, provided " that such salaries as are settled upon Judges for the time being, or any of them by Act of Parliament, and also such salaries as have been or shall be granted by His Majesty, his heirs and successors, to any Judge or Judges shall, in all time coming, be paid and payable to every such Judge and Judges for the time being, so long as the patent, or commissions, of them or any of them respectively, shall continue and remain in force (*i*)."

This provision is like many other constitutional enactments which become part of the fundamental law of the Empire, and was a parliamentary compact between the Crown and Parliament assuring the Judges of their complete independence in the administration of justice, and that neither the tenure nor salary of their offices should be subject to parliamentary or regal or executive interference during the continuance of their commissions. This was a fundamental principle of the Imperial Constitution when the B. N.A. Act was passed, and by that Act it became part of the

(*i*) The preamble of the Act recites the King's speech to Parliament that he looked upon the independency and uprightness of the Judges as essential to the impartial administration of justice as one of the best securities to the rights and liberties of his subjects, and as most conducive to the honour of the Crown, and he recommended that provision be made for continuing the Judges in the enjoyment of their offices during good behaviour, notwithstanding the demise of the Crown. He further desired that the House of Commons should enable him to secure the salaries of Judges during the continuance of their commissions. The Act was continued until 1879, as the previous Judicature Acts had fixed the tenure of the judicial offices. But was declared not to be repealed in " Her Majesty's dominions out of the United Kingdom."

It was part of the compact between William III. and Parliament in the " ACT OF SETTLEMENT," 12 & 13 William III, c. 2, "that the Judge's commission be made *quamdiu se bene gesserit*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."

constitutional law of Canada when the Dominion was established "with a Constitution similar in principle to that of the United Kingdom." And although like many other constitutional enactments this provision is subject to the paramount authority of Parliament, yet it is obvious that any interference with constitutional or fundamental laws is properly termed "unconstitutional (*j*)."

Lord Brougham has given a fairly accurate rendering of the meaning of this term. He says "we speak with perfect correctness of a law which is proposed being 'unconstitutional,' if it sins against the genius and spirit of our free government. A bill passed into a statute which would permanently prohibit public meetings, without the consent of the Government, would be as valid and binding as the Great Charter, or the Act of Settlement; but a more unconstitutional law could not well be devised. In like manner letting the people choose the judges, would be as unconstitutional as letting the Crown name the juries in all civil and criminal cases. But such laws would violate most greviously the whole spirit of our Constitution."

These observations and references we think sustain the charge that one of the constitutional rules affecting the independence of the Judges was violated, when the reduction of the salaries of the Justices of the Court of Appeal was made. The action of the Canadian Parliament in 1883 must be cited as the first and only violation of the Imperial Act of 1760, which pledged the good faith of the Crown and of Parliament to all judges "in all time coming," that their full salaries should be absolutely secured to them during the continuance of their commissions (*l*). The precedent is now historic, but it is a bad one, and Parliament and the Executive should at once revoke it, and remedy the wrong

(*j*) The constitution of the United States has a similar provision that the judges of the Supreme and Superior Court shall hold their offices during good behaviour, and shall receive for their services a compensation which shall not be diminished during their continuance in office: Art. III. s. 1. See *Martin* v. *Hunter*, 1 Wheat. U. S. 304.

(*k*) 3 Brougham's Political Philosophy, 320.

(*l*) 1 Blackstone's Commentaries, 268.

then done, and carry into practical effect the opinion expressed by the Premier, and apparently assented to by the House, that "the Judges of the Court of Appeal should get an additional salary in lieu of the circuit allowance they [were unconstitutionally compelled to] give up."

Few of the public offices in Canada hold out temptations to men of special skill and commercial enterprise. The tenure of the chief executive offices is precarious, and the salaries attached to them provide scarcely more than quiet living expenses; and are, as we have shown, much lower in amount than those which the other great colonies of the Empire vote for the members of their governments. The honours they confer generally belong to the office, and the incumbent leaves them when he leaves it. The powers which accompany the judicial office are far-reaching, and involve great responsibility to the public, and the profits are scanty. Neither the power nor the profit offer many temptations to the leading and successful members of the Bar to induce them to accept the dignified, but to a great extent isolated, retirement of the Bench, and quit the more attractive scenes of forensic power and success in

> "Mastering the lawless science of the law,
> That codeless myriad of precedent,
> That wilderness of single instances,
> Thro' which a few, by wit or fortune led,
> May beat a pathway out to wealth or fame."

JURISPERITUS.

A MODEL COURT.

Those who admire everything that belongs to the age of chivalry and romance admire the Courts of Love most. The world is full of the jingle and clatter of High Courts, Courts of Divorce, Probate, and all the rest of it. Of course they are necessary, but they are necessary because man is selfish, and spiteful, and stupid—so different from what he was. Bring back the times when they were not; when the highest court was the Court of Love; when there were no juries taken from "the body of the county," but conclaves of earnest and impartial dames and maidens; when, instead of bullying barristers, there were gentle and quick-witted lady-pleaders; when stately matrons were the most honoured judges.

Everything about modern courts is in keeping: dismal, dingy, dirty, *e.g.*, the Palace of Justice, Adelaide street East, Toronto. Everything about those mediæval courts was in keeping, too: bright, sparkling, tender. The session commenced in the gay spring time; the branches of an elm tree, just covered with young leaves, formed a fitting roof; the beautiful flowers and merry birds, within sight and hearing, harmonized with the proceedings; the ladies who held office in the court were dressed in nature's colour, green. The president, sometimes a knight but oftener a lady, had to be well versed in the forms of chivalry, and experienced in the precepts and practices of the tender passion. The names of four illustrious judges are handed down; Queen Eleanor, wife first of the French Louis the Seventh, afterwards of the English Henry the Second; Viscountess Ermengarde of Narbonne; the Countess of Champagne; the Countess of Flanders. Most noted among the male judiciary were Richard the Lion-hearted, and Alfonso of Arragon.

The Court had its consolidated rules also, but these had a wider jurisdiction than some other such rules we wot of. Thirty-one articles were the basis of all the Court's pro-

ceedings, but they were for guidance in private life as well. Here are some of them, and quaintly wise they are :—

No one can love who is not driven by the force of love.
He who hastens not cannot love.
Love never dwells in the house of avarice.
Love is always increasing or diminishing.
When once love begins to slacken it soon dies; it seldom gains strength again.
The true lover is always timid.
No one must have two attachments at the same time.
Every lover should come before his mistress with a pallid face.
The death of a lover is to be followed by two years of widowhood.

The cases brought under the jurisdiction of the Court were of sufficient diversity. A few questions, with their decisions, may be culled from some of the authorities of that age.

Once this problem was propounded: Doth the greatest affection and liveliest attachment exist between lovers or married persons? The Lady Ermengarde heard this case and thus determined it: The attachment of the married and the tender affection of lovers are altogether different sentiments. No just comparison can be established between objects which have neither resemblance nor relation to one another.

This question is theoretical: other and more practical ones are cited. A knight claimed redress under the following circumstances: His mistress had strictly enjoined him never to contend publicly. But one day he was thrown into the company of some lords and ladies, who said disparaging things about the object of his affection. At first he restrained his wrath, but at last was overpowered by the desire of maintaining the honour and defending the fame of the absent one. She, instead of thanking him, withdrew her favour, because he had broken the pledge exacted. The Countess of Champagne, however, when the dispute was referred to her, adjudged that the lady had been unlawfully severe, and that a knight could never incur blame by repelling charges brought against his mistress.

Another knight had a more serious grievance. He appeared before the same Countess of Champagne, when she

was sitting in open court of sixty ladies, and said that he had been tenderly attached to a lady whom distance and his other duties prevented him from meeting as often as he liked. They had, however, established a delightful communication by means of his secretary, and for a time all went happily. But at length the faithless secretary showed his perfidy. He made offer of devotion to his master's mistress, and succeeded in drawing off her affection, thus violating the most sacred laws of love and honour. The court reserved judgment, and, after mature deliberation, gave this decision: That the dishonourable secretary had found his mate in the lady who could encourage his advances, and that the knight might be glad to leave them to what enjoyment their base alliance could afford; but it was also decreed that they, having broken the rule of chivalry, should be forever excluded from chivalrous society: they must never seek the esteem of knights or ladies, and never show their faces in any court of love again.

In contrast to this action for breach of promise, take the instance of a more humourous trial. It is the great case, the *cause célébre*, of *in re* Kiss, in which a married lady demanded damages for the felonious taking of that precious piece of personalty. The defendant pleaded that he had long been deeply attached to the plaintiff, and that three months previously she had promised to bestow on him a kiss; yet, as often as he claimed the fulfilment of the pledge, she put him off with some excuse or other. At last, he said, he could wait no longer; and, when the lady's husband was out of the way, he took her and it by storm. The plaintiff rejoined that, in making the promise, she had limited herself to no period, and that, if left to herself, she would have fulfilled it in proper time. But the court, which, somehow or other, generally favoured the distressed cavaliers, overruled this excuse as trivial, gave judgment against the plaintiff, condemned her to pay all costs, and, in addition, to furnish a supplementary kiss. The defendant left the *aula amoris* a very happy man, and the further

directions having been carried out as to the additional penalty, the record is singularly silent as to the costs.

There is another kiss affair chronicled, which, for the sake of the sex, we wish we could find reason to doubt. A knight summoned his mistress before the court on the charge of pricking one cheek while pressing her lips against the other, with intent, &c., &c. The lady asserted that the kiss had been taken, not given, and that the wound, if inflicted at all, was the accidental result of her proper resistance. But unanswerable evidence was forthcoming; medical certificates were produced; and her statement was clearly disproved. It was decreed that, by way of reparation, she should kiss the injured cheek as often as the plaintiff chose, until it was healed! A foot note to the report in fourteenth century Latin simply states that the cheek was a long time in getting better.

All these trials took place in the twelfth and thirteenth centuries; and, sad to think, this is the nineteenth. The Court of Love is a *corpus mortuum;* its last sittings took place about the year 1382. Its nearest resemblance, faint as it is, is to be seen in the breach of promise actions of this prosaic, ultilitarian age when love is paid for in current coin of the realm, and the strongly-seasoned columns of the ubiquitous press. There Evelina is informed that, however intense her feelings, she must submit to the custom which prescribes that the gentleman shall make the offer of marriage—leap-year proposals perhaps excepted—and that there must be some sort of mutuality in the plighting of the troth. There dark-eyed Susan is told that it is quite allowable for affianced lovers to kiss one another. And there John Thomas is counselled to prefer the sober, well-nourished cook to the flighty nursery-maid, "fickle as an April morn." The times are changed. But, after all said and done, wasn't that mediæval court of first and last resort a model sort of court for the erring, with a dash of quaint equity and a good deal of human nature?

JOHN KING.

EDITORIAL REVIEW.

Execution by Electricity.

The respective merits of explosives, machine guns, rifles, and other implements of war, can be discussed with some degree of equanimity. The fact that it is human life that is sacrificed wholesale seems to lose its significance when accompanied by the pomp and glitter of war, and when viewed with the aid of patriotic feelings, pride, revenge, or ambition. The feeling is akin to that with which the embezzler on a large scale is sometimes regarded when compared with the common thief. The man who has his pocket picked of a dollar or two cannot speak without passion of the sneaking thief, while he will regard with some degree of concealed respect the bold financier who has committed a " breach of trust " by walking off with half a million.

This being an undoubted trait of human character it is surprising how coolly the respective merits or demerits of execution by hanging and by electricity have been debated. They have even been made the subject of humorous paragraphs, chiefly at the expense of the electric companies. A punning friend of the writer's, who is incorrigible, when asked his opinion the other day as to the respective merits of hanging and electricity for inflicting the extreme penalty, answered that in hanging it was only the suspense that the convict had to bear, but death by electricity was re*volt*ing.

Joking apart, however, the question has arisen, and unpleasant as it is it must apparently be settled before long. It is only from force of long habit of thought that one can reconcile himself at all to the putting of a fellow-being to death. When we come to discuss the best means of putting a human being out of existence it awakens feelings of horror in most people and makes them doubt whether it should be done at all. The people of England for an unconscionably long time hanged the perpetrators of all sorts of crimes with

the greatest coolness, perfectly convinced no doubt that they richly deserved it. Now, the death penalty is justified pretty generally upon the sole ground that a life should be forfeited for a life.

A change in the mode of execution may by raising this discussion lead to its total abolition. The hangman's qualifications are ability to tie a knot, and dullness enough to remain unappreciably affected by the sight of his work. He is generally supposed to be low in the scale of humanity. Certainly no one will believe him to be intellectual or accomplished. The electrician, however, must be a man of some scientific acquirements—at any rate, of some education. And to such a person the very suggestion that he should be employed in putting to death his fellow creatures must be repulsive. Whether he merely advises or is actively engaged, the feeling must be the same. And if executions are hereafter to be entrusted to men who would not for a moment think of engaging themselves as hangmen, will it not eventually have the effect of producing such a revulsion of feeling as to call for the abolition of the death penalty, or at any rate the restoration of hanging?

The execution of Kemmler cannot be said to have been a great success. It has not been shown that electricity is so superior to hanging or the guillotine that by common consent it should be substituted for them. There is no doubt that electricity has been so rapid in its effects in cases of accidental death that we were led to believe that the execution of Kemmler would have been performed in the space of time occupied by a flash of lightning. The fact that two shocks had to be administered, the second being most repulsive in its details, seems to show that it was bungled. And if we are to credit Edison's reported opinion, it was undoubtedly theoretically as well as practically a bungle. No doubt hanging may be bungled; and the recent execution in England, in which the convict's neck was frightfully lacerated, has done more to reconcile one to electricity than any argument.

Still, the feeling remains, have we any right to take away the life of a human being?

The County of York Division Court.

The amount of work which devolves upon the Judges of the County and Division Courts in the County of York is such that their time is fully occupied from one end of the year to the other. And if it were not that a deputy judge takes up the work in the long vacation it would very soon break down the present Judges. As it is, the work is not so thoroughly and expeditiously performed that the present arrangement can be said to be satisfactory. There is plenty of work for three Judges, and that being so it is cruel to the present Judges, and false economy, to say the least, to keep matters as they are. In the Division Court especially, the work is increasing enormously; and there is no reason why there should not be a continuous sitting except that we have not enough Judges for it. In addition to the judicial duties of the two Courts there is a constant criminal court held by the County Judge, and various sorts of extra duties are imposed upon him. He is Judge of the Maritime Court, *ex-officio* arbitrator in some cases, he examines registered plans for amendment, he appoints arbitrators in certain cases, he is a police commissioner, he hears applications for appointing constables when the justices are not in session, he is a municipal inquisitor, and if there are any other employments not written down here that he has to engage in it is only because they do not occur at the moment to the writer. In a city of nearly 200,000 inhabitants he necessarily does a vast amount more than in a rural district of the same population. However, actual experience is the best test. And the opinion both of the profession and the public is that a third Judge should be assigned to this county. We have nearly enough work for a continuous sitting of the High Court, and quite enough for a continuous sitting of the Division Court. As the appointment could only take place after legislative action by the Legislature of Ontario, we trust that the Attorney-General will seriously consider the matter at the next session. If he increases the number of the Judges, we have the greatest confidence

that no such constitutional crisis will arise as that which JURISPERITUS foresees may happen in his contribution to this number.

Forensic Eloquence.

The *Albany Law Journal* in criticizing Sir James Stephen's remark that there is no longer any forensic eloquence says :—" We suspect that the suppression does not exact a violent degree of exertion. If a new Erskine should arise there, or if we could send thither from these shores a new Webster or Choate, or even a Parker, a Black, a Beach or a Carpenter, they would make themselves heard without shame. The exact truth is that eloquence has not been jilted by the Bar, but she has thrown over the Bar." The exact truth is always hard to get at, especially when you are not on the spot. As an esteemed and much regretted late friend of the writer's used to say :—" It is not a certain one's ignorance that I object to so much as the fact that he knows so much that isn't so." The exact truth lies probably in two considerations. The one is that the leaders of the English Bar are overworked. Case follows case with such rapidity that there is probably little, if any, time for thought or for consideration as to how an address will be made. There is on this account a disposition to get at bare facts and get the business disposed of with as much rapidity as possible. The other is that a very great number of cases are tried by a Judge alone, and Webster himself, if he is the supreme example, would find it difficult to be eloquent in the face of constant and harassing interruptions from the Bench. An eloquent man will be superior before even such a tribunal, and where eloquence is effective it will still be used. And when another Erskine arises or an importation takes place the eloquent man will be heard eloquently some where in spite of everything. If there are to be any exportations from amongst our cousins we hope that the *Albany Law Journal* will do what it can to secure another Benjamin for England. That eloquence has not jilted the Bar is, we think, patent from the recent addresses of counsel

before the Parnell Commission. But it is not so useful at the present day as to require striving after. And this is an age of utility.

The Toronto Assizes.

The Toronto Assizes will open with three non-jury lists, hitherto untouched. At the last two sittings the Judges were unable to touch the non-jury lists. They therefore stood for the present sittings and a fresh list is added to them. The learned Judge who will take the sittings has intimated that he will sit until the whole list is finished. No doubt it will then be said that as there are no arrears there is nothing to remedy. But is it fair to allow cases to accumulate for the space of nine months and then leave it to an energetic Judge to clear the docket? A year ago and again in a recent number we pointed out how unequally the work is distributed. Any disinterested person can see that the increase of work is normal; and that dire necessity calls for a change in the mode of distributing it. We would much prefer to see the change effected by the Judges who are given ample power to make it, than to see it done in spite of even one of them. In fact the present state of affairs was never intended to be brought about by the Judicature Act. What (can any one suggest?) would be the use of giving jurisdiction to the Chancery Division if it was intended that they should not exercise it? And if they were intended to exercise it the intention is certainly not carried out by the present arrangement. At the present time there is sufficient judicial strength to perform all the work in the ten months allotted to it. But because of the present arrangement four assizes have to be taken in vacation. There are strong indications that the Queen's Bench and Common Pleas Divisions will have to be reinforced before long by the addition of a Judge to each. But at present by a proper distribution of the work the present Judges could accomplish it all.

REVIEW OF EXCHANGES.

Albany Law Journal.—29th March, 1890.

Are Women Legally Eligible in New York as Notaries Public? by NATHANIEL C. MOAK. After citing English and American authorities, the learned writer concludes that there is no legal objection to the appointment of a woman to the office.

Ibid.—28th June, 1890.

Damages for Mental Suffering Occasioned by the Negligence of a Telegraph Company. After citing some cases in favour of awarding damages, the learned writer concludes against the policy and the right.

Ibid.—12th July, 1890.

Insurance of Trust Property, by JOHN S. MELCHER. A trustee should insure as if he were owner, that is, up to the full insurable value and not only the value of the life tenant's estate. The premiums are properly payable out of the life tenant's income.

Ibid.—19th July, 1890.

The Taxing Power—its Constitutional limitations, restraints and requirements, by W. J. GAYNOR.

Ibid.—9th August, 1890.

Authentication of the Execution of Deeds by Corporations. The deed being executed by affixing the seal, the execution may be authenticated by the officer who affixes it or by a subscribing witness.

American Law Register.—June 1890.

The right of the Federal Courts to punish offenders against the ballot box, by D. H. PINGREY.

Central Law Journal.—2nd May, 1890.

The Statute of Limitations in Cases of Fraud, by SIMON OBERMEYER. Concluded in the following number. The early doctrine of Equity is stated, then the statutory provisions, and both English and American authorities are cited thereon.

Ibid.—16th May, 1890.

The Modern Law of Curtesy, by GEORGE LAWYER. The learned writer thinks that as the wife's right to dower is unconditional, the husband's right to his consummate estate should not be made to depend on the birth of issue.

Ibid.—23rd May, 1890.

The Extinguishment of an Easement, by JOHN D. LAWSON. An easement extinguished by the act of God, as the drying up of a spring, may revive, but one extinguished by the act of the parties will not revive. Instances are given of cases in which an easement will, and those in which it will not, be extinguished by unity of seisin, and those in which the act of a party extinguishes it.

Ibid.—30th May, 1890.

Some Disputed Questions in Mandamus, by S. S. MERRILL. Concluded in the following number. The writ is usually confined to public rights, but private rights may be enforced where they are of *quasi* public importance, as where an officiating minister was restored to his function. In most cases the writs are against corporations which have a public status. Business may assume a public nature, as in the case of all kinds of common carriers against whom the writ will lie. In some cases where there is a discretionary power in a subordinate body the writ will lie.

Ibid.—13th June, 1890.

Some Natural Gas Cases, by W. W. THORNTON. Some cases illustrating the application of general principles of law to natural gas companies.

Ibid.— 20th June, 1890.

The Separate Acknowledgment of Married Women, by E. G. SOLOMON.

Ibid.—4th July, 1890.

Consolidation of Corporations, by SEYMOUR D. THOMPSON. As a corporation can only be created by the Legislature, so without the authority of that body it cannot merge its existence in that of another corporation. But a corporation having power to consolidate can consolidate with one not having that power. Generally a consolidation cannot take effect without the unanimous assent of the shareholders unless at the time of subscription there was general statutory power to consolidate.

Ibid.—11th July, 1890.

Non-taxable Institutions, by D. H. PINGREY. Exempted property is liable to special frontage taxes, as for laying a pavement in front of it. Generally, when property is exempt it must be exclusively used for the purposes which operate to exempt it. If used partly for other

purposes it is not exempt. Private educational establishments are not exempt. A temporary use of exempted property for other purposes will not forfeit the privilege. Religious establishments are exempt only when the property is vested in the congregation. If private then it is not exempt, though its use by many persons may be allowed. Masonic lodges are said to be purely charitable establishments and so exempt, but other property held by them is not exempt.

Ibid.—18th July, 1890.

Criminal Seduction, by D. R. N. Blackburn. Seduction is defined and distinguished from rape. When it takes place under promise of marriage, and the promise is an essential element in the offence, it is held that if the promise was believed to be valid by the person seduced it is sufficient, though in fact the promise was not valid. Various statutory provisions are illustrated by cases.

Ibid.—25th July, 1890.

Legal Status of Adopted Children, by J. G. Woerner. Adoption being ignored by the common law, it is entirely regulated by statute. These statutes give the correlative rights of the natural relationship. The *lex loci* governs as to extra territorial effect of adoption.

THE

CANADIAN LAW TIMES.

OCTOBER, 1890.

REVOCATION OF AN OFFER.

SIR WILLIAM ANSON, in commenting upon several cases of contract, points out serious difficulties in the way of reconciling them which turn upon the relative rights of parties with respect to withdrawal or revocation of an offer before acceptance. We cannot hope successfully to point out the solution of the difficulties raised by Sir William Anson's analysis after it has been abandoned by that learned author, but an examination of the cases in question, and an analysis of some of the objections and difficulties commented upon by the learned author may be of some use. We shall first state the cases which appear to conflict and then consider the objections raised, which will, of course, involve a consideration of the particular phases of the law of offer and acceptance applicable to them respectively and also in their relation to the general law.

In *Byrne* v. *Van Tienhoven* (*a*) it appeared that the defendants, carrying on business at Cardiff, wrote to the plaintiffs, carrying on business at New York, on the 1st October offering 1,000 boxes of tinplates. The letter reached the plaintiffs on the 11th October and they immediately cabled an acceptance. On the 8th October the defendants wrote a letter to the plaintiffs by which they attempted to withdraw the offer of the 1st October and posted it, and the plaintiffs received it on 20th October. On the 15th October

(*a*) L. R. 5 C. P. D. 344.

the plaintiffs wrote confirming their cable despatch. The defendants declining to carry out the sale, the plaintiffs brought the action. It was tried before Lindley, J., without a jury, and the questions which the learned judge presented as calling for adjudication were two: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent? Both questions were answered in the negative, and judgment went for the plaintiffs.

In *Dickinson* v. *Dodds* (*b*) the facts were that the defendant Dodds signed a paper by which he agreed to sell a piece of land to the plaintiff, and added in a postscript that the offer was to be left over till Friday at nine o'clock a.m. Before that hour he sold the land to Allan; and the plaintiff having heard of it delivered a written acceptance of the offer to the defendant Dodds before nine o'clock on the Friday named. He then brought an action against Dodds and Allan for specific performance by Dodds, and a declaration that Allan had no interest in the land. The action was dismissed by the Court of Appeal, reversing the judgment of Bacon, V.C., who had decreed specific performance. James, L.J., states categorically that "there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. * * Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed." Mellish, L.J., considers the sale to some one else as equivalent to the death of the offerer, because it makes the performance of the offer impossible. He also puts it that the contract of sale to Allan, having been completed first, was entitled to prevail as being first in point of time. He also states that if the law is that an offer is a mere *nudum pactum* until accepted, the acceptor cannot make a binding contract if he knows

(*b*) 2 Ch. D. 463.

that the offer has been made impossible of acceptance by a sale to some one else.

In *Cook* v. *Oxley* (*c*) the defendant offered to sell a quantity of tobacco to the plaintiff and to keep the offer open until four o'clock. The tobacco was sold to some one else meanwhile. Judgment was arrested after verdict for the plaintiff, the court holding that the declaration did not disclose a cause of action by alleging a contract. Sir William Anson says of this decision: "It certainly would seem that the court not only regarded Oxley as free to revoke his offer at any time before acceptance, but free to revoke it by a mere sale of the goods without notice. The judgments are even open to the construction that they regard Oxley's offer as no more than an invitation to do business on certain terms within a certain time; and not to be an offer which, unless revoked, might be turned by acceptance into a binding contract."

In each one of these cases the same question arises and is disposed of, except that in *Cook* v. *Oxley* the authority, as far as it is binding, must be confined to the question of the sufficiency of the plaintiff's declaration, for on that the case turned. In each the same state of facts was presented—an offer was made and retracted—except that in *Byrne* v. *Van Tienhoven* the offer became a contract by acceptance before the letter of withdrawal was received. They are, therefore, fair cases for comparison or contrast as showing how the matter of offer and withdrawal has been treated in slightly different phases.

It must be observed that in *Byrne* v. *Van Tienhoven* the sole question was as to the effect of a letter of withdrawal; while in *Dickinson* v. *Dodds* the right of a third party who had made a complete contract intervened. The importance of settling a case of the former class upon an absolutely true principle is apparent when we come to consider the right of the offerer to create such a new right as was dealt with in the latter case.

(*c*) 3 T. R. 653.

Sir William Anson's difficulties will best be stated in his own words. He approves of *Byrne* v. *Van Tienhoven*, but considers the other two cases to conflict with the rule upon which it is based. *Cook* v. *Oxley* is in most of the text books treated as of less importance than is here attached to it, the decision having turned upon the pleadings, though in fact the test of the sufficiency of the declaration was, of course, whether it stated a sound legal proposition.

With regard to *Dickinson* v. *Dodds* the learned author suggests three grounds upon which it may be distinguished from *Byrne* v. *Van Tienhoven*: First, the knowledge of the acceptor may be treated as good notice of revocation. This is said to be dangerous ground. Secondly, the distinction may be that in both *Cook* v. *Oxley* and *Dickinson* v. *Dodds* the sale was of a specific thing, the disposal of which before acceptance would be a sufficiently overt act to amount to a revocation. Thirdly, there may be a warrant for the view that where the parties are in direct communication the theory of the "continuing offer" does not hold. He then summarizes the difficulties as follows: "There is an offer outstanding for the sale of a specific thing, which offer may be turned into a promise by an acceptance within a limit of time fixed by the parties. If the parties had been contracting by correspondence, then as against an acceptance made within that time a revocation would be of no avail unless it were previously communicated to the acceptor. An unauthorized communication is made to the intending acceptor that the offerer has, not merely formed the intention of revoking his offer, but has actually sold the thing offered. The acceptor in the full belief, as he admitted, that the property had actually passed to a third party endeavours by an acceptance made within the prescribed time to bind the offerer. The offerer had done nothing to communicate his intention to revoke, or his revocation, up to the moment of acceptance, yet he was held not to be bound. It must be left to the courts to distinguish this case, whenever it may be necessary to do so, from *Byrne* v. *Van Tienhoven*. They will have to say

whether the ground of distinction lies in the fact of communication being made somehow of the offerer's changed intention; or in the fact that what the offerer did was not merely to change his mind, but by the sale of the specific thing offered to put it out of his power to fulfil his offer; or in the fact that the parties were not contracting by correspondence; or, lastly, in the fact that the acceptor admitted that he made his acceptance in the full knowledge that the offerer not only *would not*, but no longer *could* perform his offer."

With regard to the first distinction, if we may venture to say so, we think that this suggested distinction embodies the true explanation of the case, and contains the sound rule upon which all cases of retractation so-called are based. The learned author, in criticizing it, says: "Would the same rule apply in the case of an offer of personal services and notice from a stranger that the offerer had made an inconsistent engagement?" And he points to the inconvenience to the acceptor arising from his not knowing what to believe from other sources. To state the case of a personal engagement is merely to state the proposition in another form and does not advance us. And it may be said that if a proposed acceptor will take time to think, he must submit to the risks and inconveniences that arise from his own deliberate action.

It is worth while to examine this suggested distinction and ascertain its validity.

It has not been disputed, it is too late to dispute, that an offer by letter is presumed to be a continuing offer until accepted or withdrawn. "The law," says Sir William Anson, "regards the offerer as making the offer during every instant of time that his letter is travelling and during the period which may be considered as a reasonable time for acceptance." This is equivalent to saying that the offer is made at the last moment of time before acceptance or withdrawal as well as at every previous moment. Consequently an offer communicated may be withdrawn the moment before acceptance. In other words the offerer has complete

control over his offer before acceptance. From this point of view as well as from that of the acceptor it is considered as made immediately before withdrawal or acceptance. He may offer to as many as he pleases at the same time and may retract all or any of his offers. He puts himself under no obligation by offering, and therefore he is liable to no one by reason of offering or retracting. If an offer were made and forwarded but never reached its destination no obligation could of course arise; but if the person for whom it was destined got knowledge of it elsewhere, could he not presume it to be continued to or in fact to be made at the moment at which he acquired knowledge of it, and could he not then accept and enforce it? If the essence of contract is the *consensus* of two minds, the moment they are *ad idem* that moment a contract arises. If the offerer has launched an offer can he complain that the acceptor did not acquire his knowledge of it from his messenger, but from some one else, if in the meantime he has not withdrawn it? This brings us to the question, what is the true purport of the rule that an offer may be treated as subsisting or continuing until, or in fact as being made at, the moment at which it is accepted? Is it not based upon the fact of the knowledge of the acceptor that the offer is being made, whether communicated directly to him by receipt of the offer or indirectly by being told of it? He can take advantage, *ex necessitate*, only of that which comes to his knowledge,and of that which comes to his knowledge at the time of acceptance. If an offer, before reaching him, were modified, and he first acquired knowledge of it in its modified form, he could only accept it as modified. If he has knowledge of an offer for a length of time, and he concludes within a reasonable time to accept it, his position is that of a man who accepts instantly upon the offer being made, inasmuch as he may presume the offer to be made as much at the last moment as at the first moment of its coming to his knowledge. It is clear therefore that in the case of a deferred acceptance he acts upon such knowledge as he has, and he may in law presume that knowledge to be correct. In other words, he acts

upon a presumption. Contracts by correspondence could not be made unless the offer was open until withdrawn or accepted, and although the offer is *de facto* made when signed by the offerer and despatched, it is *presumed* to be repeated constantly until withdrawn or accepted. The repetition at the last moment before acceptance is a pure but necessary fiction. It is so treated in the last edition of Chitty on Contract (*d*) where it is said, "But it appears that this rule [that the acceptor cannot make a binding contract by accepting after he knows of a prior sale] must be received with the following qualification, viz., that if an offer be made by letter to a party at a distance, it is *presumed* to be constantly repeated until the period for acceptance arrives, up to which period it is to be *inferred* that there is a continuation of the intention of the contract; and that the acceptance of the exact terms proposed, within the period limited, shall form a complete contract as from the date of such acceptance, provided that the party making the offer has not in the interim withdrawn it." This agrees, though not in the exact mode of expression, with Sir William Anson's interpretation that the "*law regards* the offerer as making his offer during every instant of time that his letter is travelling." The repetition of the offer then is a mere presumption. The acceptor may act upon the repetition of the offer which is presumptively made the moment before he accepts, if he knows nothing to the contrary. But presumptions do not arise when the facts are known. There can be no presumption against fact. And if the fact is that the offerer has withdrawn his offer, or has made it impossible of acceptance, and so has impliedly or inferentially withdrawn it, the proposing acceptor cannot resort to the presumption or inference that it is being repeated every moment. He knows the contrary to be the fact, and as there was no obligation while the offer remained an offer either to continue or repeat it, or to carry it out, there could be no liability for not consummating it. If there is no liability for not continuing the offer is there any liability

(*d*) P. 14.

for not informing the proposed acceptor of the revocation? Clearly not, because if he had the knowledge from another source he could not be damaged. His action, after having received such knowledge from any source, would be purely voluntary and not attributable in any way to the offerer.

It would seem then that there is a presumption of a repetition of the offer at the moment of the acceptance; and if the acceptor knows the fact to be that the offerer is not repeating the offer at that moment he cannot act upon a presumption which would be against the fact. Indeed, there could be no presumption, for the fact is known; and the inference from the fact is that there is no offer being made. If that be a true analysis of the matter it makes no difference whence the knowledge of withdrawal comes.

The fallacy, if there be one, is in treating the offerer as under an obligation to inform the proposed acceptor of the withdrawal if he would escape liability. As James, L J., puts it, "of course it may well be that one man is bound in some way or other to let the other man know that his mind with regard to this offer has been changed." But the breach of such an obligation is not actionable. He runs a risk if he does not communicate his change of mind. He leaves the acceptor in a position to entitle him to rely on the offer. But this dictum cannot be taken in a sense contrary to the decision; for it was ultimately held that he was not bound though he had not himself communicated the change of mind to the acceptor.

The true position, if we may so denominate it, is that the proposed acceptor may act upon the offer as a repeated offer if he knows nothing to the contrary. Hence we may object to Sir William Anson's term "unauthorized communication," *i.e.*, a communication of retractation by some one other than the offerer. It implies that the offerer is held by his offer unless he personally withdraws and notifies the withdrawal, whereas he is not held by his offer at all before acceptance. We may also object to the pregnant suggestion of an obligation contained in the sentence already quoted, "the offerer had done nothing to com-

municate his intention to revoke, or his revocation, up to the moment of acceptance, yet he was held not to be bound." That assumes that he alone could communicate the revocation. There is probably no authority for the proposition that he must communicate the withdrawal or it would have been cited, though it must be admitted that he runs a risk if he does not. And it is against principle if the position of the proposed acceptor is correctly interpreted in the passage cited from Chitty.

That interpretation is consistent with the expression of Lindley, J., in *Bryne* v. *Van Tienhoven*, when he says that "both legal principle and practical convenience require that a person who has accepted an offer *not known to him* to have been revoked, shall be a position safely to act," etc. There is no intimation here that the knowledge of retractation must come from the offerer or by his authority. Conversely, if the offer is known to have been revoked, the acceptor cannot act so as to bind the offerer. And this is exactly in accord with *Dickinson* v. *Dodds*.

It is further said that the following words by James, L.J., in the latter case are in direct conflict with those first quoted:—"I apprehend that there is neither principle nor authority for the proposition that there must be an actual and express withdrawal of the offer, or what is called a retractation." It must be observed that this does not refer at all to the communication of the withdrawal. It does not directly or indirectly hint that the knowledge of withdrawal must be derived from the offerer, and therefore it does not affect the proposition in *Dickinson* v. *Dodds*, that the proposed acceptor cannot accept if he knows that the offer is not being continued. The learned Judge is here speaking of the supposed necessity for an express withdrawal, as by saying, "now I withdraw my offer." He says that is not necessary. The offer may be discontinued or withdrawn impliedly, as by death or disposal of the subject-matter. Still, the acceptor may accept if he does not know that the offer is withdrawn.

With some diffidence, therefore, we conclude that the

first suggested distinction is not in reality a distinction, but is in fact expressive of the true rule as to acceptance, viz., that the proposed acceptor may act on the legal presumption that the offer is being repeated unless he knows the fact to be otherwise; that the offerer runs the risk of becoming liable if he does not see to it that the retractation is communicated to the proposed acceptor, but he is under no obligation to communicate the withdrawal if the proposed acceptor has already acquired the knowledge of it. We may also conclude that there is no conflict between the cases cited, for there is nothing in *Bryne* v. *Van Tienhoven* to indicate that the offerer alone must inform the proposed acceptor of his retractation. That case decides that the acceptor may act upon the offer in the condition in which it is or appears to be when he first acquires knowledge of it. *Dickinson* v. *Dodds* determines that if his knowledge of the offer is other than that which appears upon its face he cannot act upon an undoubted false appearance. Perhaps the terms "withdrawal," "retractation," and "revocation" should be abandoned as implying that the offerer releases himself only by directly taking from the proposed acceptor the right or privilege of further consideration.

Reference may now be had to Sir William Anson's query, whether the rule in *Dickinson* v. *Dodds* would apply to a contract for personal services. Suppose that an actor should offer his services (by an offer which would be binding if accepted) to a theatrical manager. While it is under consideration the actor engages with another manager. The first manager goes to the theatre of his rival and sees the actor on the boards, and then ascertains that he has made a binding engagement. The next day he writes and accepts the actor's offer. It would be a surprise to be told that the actor was answerable for breach of contract. There could be no contract proper, for there was no *consensus* of minds. There would be no equity in favour of the manager; and there would be no liability on the part of the actor for not keeping his offer open. It would be difficult to find authority for the proposition that the actor

had rendered himself liable for damages because he had not himself communicated his intention to revoke his first offer. It certainly does not appear from the case of *Byrne* v. *Van Tienhoven*.

Or, to put a more emphatic case recently mentioned to the writer. A man makes an offer of marriage. Before acceptance he marries someone else The woman who received the first offer, on hearing of the marriage, accepts his offer, and immediately brings an action for breach. It is clear that the marriage is not a breach of a contract, for no contract existed when it took place. An unaccepted offer existed, but there was no obligation. Here damages would be the only relief, but this state of facts clearly exemplifies the relative position of the parties. In the case of the actor, the first manager could not restrain the actor from fulfilling an agreement entered into before the first manager had put himself in a position to demand relief of any kind. And as for damages, there could be no breach of a contract never made.

We may here consider the elements of an accepted offer, such as that in *Byrne* v. *Van Tienhoven*, which has been revoked by the offerer, unknown to the acceptor, before the acceptance. We have already stated that if the offerer changes his mind he runs a risk if he does not communicate it to the proposed acceptor. We shall have now to ascertain what that risk is. It is essential to a contract that there should be a *consensus* of minds. It is clear that in such a case as *Byrne* v. *Van Tienhoven* there is not the essential element of a contract, for at the time of the assent given by the acceptor the mind of the offerer is opposed to him. There is, therefore, no *consensus*. At the Roman law the requisites of an agreement were several persons, a concurrence of wills, and a declaration of the concurrence, promise, and acceptance. Where a proposal was made to a party at a distance revocation was allowed before the absentee had received the proposition, and that whether the revocation became known to him before or after his acceptance. This was the logical result of the requirements of an agreement, for there was no con-

currence of wills if at the time of acceptance the offerer had changed his mind. A contrary view is taken by English law. A revocation not known to the proposed acceptor is no revocation at all as regards him. But to allow an accepted offer to become a contract, when as a matter of fact the offerer had changed his mind before acceptance, is an anomaly. Perhaps the English law is more just in allowing the acceptor to take advantage of his acceptance, but the declaration of *consensus* contained in the offer and acceptance is untrue. The minds were not *ad idem* when the acceptance took place. Such a declaration is rather a quasi-contract. It bears the form of a contract, but does not contain the elements of one. There is an obligation arising out of the equity of the acceptor's claim, but the form of action is necessarily upon an accepted promise.

The true injury which is done to an acceptor who accepts without knowledge of a revocation is that he has been, by the combined action and inaction of the offerer, led to believe that he could make a binding contract. There was at common law, apparently, no form of action for such an injury. The case appears to have first arisen for determination at a comparatively recent date. The form of action adopted in *Byrne* v. *Van Tienhoven* was apparently for breach of a contract. The measure of damages would in each case be the same; and the form of action adopted at the present day would be immaterial, if indeed it can be said that there is any particular form of action. It may also be a question whether the argument from convenience is founded upon true principles. The inconvenience which would arise from the application of the Roman rule would probably exceed that which would arise from the English rule. The very fact that the application of the rule is of so recent an origin shows that the cases must have been either very rare or of exceedingly small importance. The Roman rule was logical, severely so. The English rule is illogical as long as we regard the acceptance of a revoked offer as making a contract. If we regard it as quasi contract, and allow that the true relief is for a species of misrepresentation, the measure of damages being the same as

for a breach of a true contract, then the symmetry of the law as to offer and acceptance is not disturbed.

If this analysis is correct, then the position of an offer accepted after knowledge of its cancellation is clear. There never is in such a case a *consensus* of minds, and the acceptor knows at the time of acceptance that there is no *consensus*. There is, therefore, the form of a contract, but it does not contain the essential elements, and the acceptor has no equity in his favour.

With respect to the second suggested distinction, viz., that it may be found in the fact that there was a sale of a specific thing, and that possibly the sale to another, by which the property is passed to him, is a sufficiently overt act to amount to notice of revocation. If the first suggested distinction is not a distinction but an expression of the true rule, then the second becomes clear upon a like analysis. The subject matter, if a specific thing as in *Dickinson* v. *Dodds*, is gone by sale to another, and that amounts to revocation or a refusal to repeat the offer. But it cannot be contended that the mere sale to another is an overt act at all, unless it is open to the proposed acceptor. That is, the sale is not notice unless the proposed acceptor has knowledge of it. Sir William Anson refers to the suggestion of this made by the reporter in the head note; but as to this Benjamin says (*e*), "There is nothing in the judgment to warrant the statement in the head note:—'*Semble*, the sale of the property to a third person would of itself amount to a withdrawal of the offer, *even although the person to whom the offer was first made had no knowledge of the sale.*'" The act of sale to another is not "overt" to the proposed acceptor unless he knows of it. If he knows of it he knows that he cannot act as though the offer were being repeated to him. And he knows that there never can be a consensus of minds. It is not necessary to make this distinction, however, if *Dickinson* v. *Dodds* has been correctly interpreted, though there are some considerations affecting the sale of a specific thing to which we shall now refer.

(*e*) P. 47.

In *Dickinson* v. *Dodds* the relief asked was specific performance. The jurisdiction to order specific performance is discretionary. not in an arbitrary sense, but in the sense that if there is anything inequitable in the conduct of the plaintiff, that may induce the Court to refuse the relief sought. It is purely equitable in that the court will not grant the relief except upon equitable considerations. This ground is not referred to in the case, nor have we seen it mentioned elsewhere in connection with a like state of facts, and therefore it is referred to with great diffidence. But is it not abundantly clear that the plaintiff who accepts an offer which he knows cannot be fulfilled, is not entitled to come to the Court on equitable grounds to ask for the delivery in *specie* of that which has gone beyond his reach and the offerer's? Reference may also be had to *Potter* v. *Saunders* (*f*), where the Court had to deal with two contracts for the same land and enforced the first in point of time. Lord Justice Mellish refers to this as a ground of the decision, and it appears that there is authority for it.

With regard to the last suggested distinction, namely, that where the parties are in direct communication the theory of the "continuing offer" does not hold. It would be difficult to sustain this. Contracts by correspondence are assimilated to the constituent elements of an agreement. If parties directly communicating with each other agree there can be no retractation. If they negotiate and pass backwards and forwards offers, counter-offers, and suggestions, it is only in degree and not in principle that such negotiations differ from negotiating by correspondence. Apart altogether from the fact that before they would be bound there must be a writing, except in cases of very slight importance, it is difficult to conceive how the rights of a third person could intervene unless in the case of a shopman offering his wares to a number of customers, or an auctioneer who is repeating his offers to sell to everyone in the room.

In the case of a shopman the remark of Sir William

(*f*) 6 Ha. 1.

Anson is very pertinent. "The judgments [in *Cook* v. *Oxley*] are even open to the construction that they regard Oxley's offer as no more than an invitation to do business on certain terms within a certain time; and not as an offer which, unless revoked, might be turned by acceptance into a binding contract." Whatever may be the legal obligation of a shopman who offers every one of his customers present a certain amount of a certain commodity at a certain price, and who exhausts that particular commodity before he satisfies all his customers, there is no doubt that the common-sense interpretation of his offers would be that they were subject to the qualification that he was not to be sued for breach of contract. He is offering to do business as well as he is able and to the extent to which he is able. But his position would be precarious if he assented to a request to sell a certain thing (under the value of £10) and then found he had it not. And if this may be done on a small scale why not on a large?

With regard to sales by auction, they are said to be nothing more than offers and acceptances. The offers are, no doubt, understood to be made upon the understanding that if a better offer is made they will not be binding. Except in these two cases it is difficult to imagine how parties in direct communication could, before they separate with an agreement made, be affected by the interposition of a third party. But apart from the improbability in fact, is there any solid distinction between negotiations carried on across a table and those carried on by post?

EDITORIAL REVIEW.

Mr. Justice Meredith.

The vacancy in the Chancery Division occasioned by the resignation of Mr. Justice Proudfoot has been filled by the appointment of Mr. R. M. Meredith, of London, Ontario. Young, active, energetic, and endowed with good abilities, Mr. Justice Meredith will prove a useful addition to the Court.

It is to be hoped that another spring will not pass without an energetic attempt being made to fuse the circuits. Mr. Meredith was one of the Joint Committee appointed by the County Law Associations to express their views upon this and other matters when the Rules were undergoing revision and consolidation, and we may therefore take it for granted that in the place of an opponent we have an advocate on the Bench for this useful and much needed reform.

The New Examiners.

The establishment of the Law School necessitated the appointment of examiners who should not be lecturers. Messrs. Kingsford and Drayton having been appointed lecturers, it became necessary to have a new examining staff, and the Benchers have appointed Messrs. F. J. Joseph, M. G. Cameron and Aytoun-Finlay to the position. Mr. Joseph is the joint compiler of Robinson and Joseph's Digest, and the compiler of the Ontario Digests which have been published since. Mr. Cameron is the author of the well-known work on Dower. Mr. Aytoun-Finlay has not yet distinguished himself as an author, but will no doubt do so as an inquisitor.

Provincial Pardons.

The decision of the case of the *Attorney-General of Canada* v. *Attorney-General of Ontario*, which was designed to determine the validity of the Act of the Province, 51 Vict. cap. 6, was to a great extent anticipated, and will meet with very general approval as far as it goes. But in our estimation the omission of a most important factor in the argument seriously affects the value of the decision, if it does not leave it entirely indeterminate as to the powers of the Province. We refer to the 25th section of chapter 173 of the Revised Statutes of Canada. Lying almost concealed under the title of the "Act respecting Threats, Intimidation and other Offences," we find these clauses:—"Every wilful violation of any Act of the Parliament of Canada, or of the Legislature of any Province of Canada, which is not made an offence of some other kind, shall be a misdemeanor, and punishable accordingly. 2. Whenever any wilful violation of any Act is made an offence of any particular kind or name, the person guilty of such violation shall, on conviction thereof, be punishable in the manner in which such offence is, by law, punishable."

These clauses were passed in the first and second sessions of the first Parliament of Canada held after the union; and appear to be based, as to offences against Provincial Statutes, on an assumption that the Provinces could not reach all offences, having no jurisdiction over crime. Their actual effect, if effectual at all, may be much greater; or on the other hand, as to Provincial offences they may be entirely inoperative, as being *ultra vires*.

For this reason it is much to be regretted that their provisions were not passed upon in the case in question. As far as we can learn they were not even referred to in the argument. From the eminent standing of the Counsel engaged in the case, and the constitution of the Court, three judges of the Chancery Division, one might almost infer that the clauses were immaterial. If so, it would have been more satisfactory to have referred to them in some manner. Their possible effect can be ascertained only from he examination of the relative powers of the Legislatures.

The Provincial Act in question, 52 Vict. cap. 6, recites section 65 of the B. N. A. Act, section 92 of the same Act, and then enacts that the powers of the Governors and Lieutenant-Governors of the old provinces with regard to all matters within the jurisdiction of the Legislature of the Province are vested in the Lieutenant-Governor "in the name of Her Majesty, or otherwise, as the case may be; subject always to the Royal Prerogative as heretofore." Section 2 is as follows:—"The preceding section shall be deemed to include the power of commuting and remitting sentences for offences against the laws of this Province, or offences over which the legislative authority of the Province extends." And it was upon this section that the contest arose.

It is important to observe that section 65 of the B. N. A. Act which is recited in the preamble declares that "all powers, etc., which under *any Act of the Parliament* of Great Britain, etc., were . . exerciseable by the respective Governors, etc., shall, as far as the same are capable of being exercised after the union in relation to the Governments of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor, etc." The power of granting a pardon was not exerciseable by virtue of a statute, though the statute now consolidated in R. S. C. cap. 181, sections 38 to 40, applies to certain matters in connection with pardon and commutation of sentence. And the forty-third section expressly declares that nothing in the Act shall limit or affect the Royal prerogative of mercy. We must also observe that clause 12 of the B. N. A. Act has exactly similar wording to that of clause 65, except that it deals with matters in relation to the Government of Canada. They appear to affect the distribution of executive powers exerciseable under statutory authority.

But whether they relate to the question at issue or not, the recital of clause 65, followed by the enactment declaratory of its purport does not appear to have an important bearing on the case. The B. N. A. Act allows these powers to be altered or abolished by the Legislature. The clause

in question does neither, but is almost exclusively declaratory of the very provisions of the Constitutional Act.

It is the second section, whose terms specially interpret the declaratory clause, that raises the question, and the issue must depend upon whether it correctly interprets its predecessor or not. The proviso at the end of the first section that the powers are exerciseable "subject always to the Royal Prerogative," appears to make the enactment ambiguous if regarded as dealing with a prerogative right. If they are subject to the prerogative, or, exerciseable only in so far as the prerogative may not be exercised, the whole question is left open. But if they are to be construed so as to carry a meaning consistent with the remainder of the section they must mean "subject to the paramount right of exercise of the Royal Prerogative with which it is not intended to interfere." That is, the Lieutenant-Governor may, concurrently with the Sovereign, exercise the prerogative of mercy. But if His Honour represents Her Majesty and exercises the pardoning power in Her Majesty's name there can be no concurrent exercise of power.

The second section may, however, be supported on other grounds. We have before stated as a probable construction of the B. N. A. Act, that many matters which were before that enactment within the prerogative right of the Crown are now within the legislative jurisdiction of the Provinces. In other words the Crown by assenting to the B. N. A. Act has probably abandoned the exercise of the prerogative in all these matters which are specially confided to the Provinces. Amongst other subjects of jurisdiction, the Legislature of each Province may make laws in relation to "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section": section 92, sub-section 15. This carries with it the power of limiting, abridging, or remitting the punishment, and consequently the power of commuting it. If the Legislature can create an offence and impose a penalty, it must have jurisdiction to remit the penalty, because it is dealing with a subject over

which it has exclusive jurisdiction. If it can so deal with the punishment it can authorize its chief executive officer so to deal with it on the advice of the responsible committee of the House, viz., the ministers of the day. Regarded from this point of view the issue depends altogether upon the legislative jurisdiction of the Province. Admitting that interpretation, the first clause of the Act which, by its proviso, declares that the exercise of the powers are subject to the Royal Prerogative, would have this effect, that while the Lieutenant-Governor could exercise the statutory power of remitting or commuting sentences, it would be subject to the exercise of the Royal Prerogative, which is exercise-able in Canada ordinarily by the Governor-General under his commission, or by Her Majesty, if so minded—a conclusion not arrived at by the decision in the case. Or, if as a matter of construction, the B. N. A. Act effects an abandonment of the prerogative right of mercy by the Sovereign to the Legislature, then the declaration in the Act in question that it is subject to the Royal Prerogative effects a surrender of the prerogative right again to the Sovereign to be exercised at will, or by the Sovereign or his representative concurrently with the statutory power. If the Lieutenant-Governor in reality represents the Queen then the Act was unnecessary. And the third section contains a guard against its being determined that he does not.

The effect of the Dominion Statute to which we before referred has not received consideration. It is directed to a breach of a statute which is "not made an offence of some other kind." If the breach is of a Dominion Statute there is no difficulty in construing the clause; but if the breach be of a Provincial Statute it is difficult to ascertain its effect. It assumes that there exists a power in the Legislatures to classify the offences against their enactments. In dealing with crime the Dominion Parliament may create felonies and misdemeanors or legislate respecting those offences which are already so classified. But the Legislature cannot create crimes or deal with them at all with regard to their classification. A breach of a Provincial Act may be visited with fine, penalty or im-

prisonment, and the offences against such Acts may be classified according to the punishments imposed for their infringement; such as offences punishable by fine, those punishable by imprisonment, etc. But every such offence, in its nature and essence, is simply an offence against a Provincial Act. It is not susceptible of any other classification. The Legislature cannot make it a misdemeanor. What, then, is the significance of the Dominion Act when it says that a violation of an Act of the Legislature "which is not made an offence of some other kind, shall be a misdemeanor." The Legislature cannot make them of any kind. If it means that when they are not made of some other kind by the Dominion Parliament they shall be misdemeanors, the clause would assume jurisdiction to deal with all offences against Provincial Acts as crimes. If that be so, even if we consider the enacting part by which provincial offences are made misdemeanors, the grave question arises, can the Dominion exercise any jurisdiction at all in the premises? No doubt the Parliament can create crimes. That is, it can declare to be a crime that which before was an innocent act. The simultaneous marriages of the Mormons were not a common law offence; nor were they bigamous. But now they are criminal offences by virtue of Dominion legislation. But can the Parliament make a crime of the breach of a Provincial Act. Apparently not; because the subject matter of the Provincial Act is not within the jurisdiction of the Dominion Parliament.

We have an illustration of this in the enactment which makes concealment of deeds or falsification of a pedigree a misdemeanor. Hitherto it has been dealt with as if the Provinces had no jurisdiction to impose a punishment for such offences. The clause was printed in the Provincial Statutes, but not as having any legislative force. As the enactment at present stands, assuming it to be valid, it makes a misdemeanor of an offence with respect to a matter over which the Province has ample jurisdiction. By the Provincial Act the offender is liable to damages. By the Dominion Act he is guilty of a crime. If the Provincial Legislature could make such an act an offence

punishable by fine, imprisonment or penalty—and we see no reason why it could not have done so—the question would arise, would the Act creating it a Provincial offence be valid as against the Dominion enactment that the offence is a misdemeanor? No penalty is attached to a violation of the enactment by the Province, and if it were not for the express enactment making it a misdemeanor, it would probably be a misdemeanor by virtue of the general enactment contained in R. S. C. cap. 173, sec. 25. If a vendor were convicted of a misdemeanor under this Act, could the Lieutenant-Governor pardon him on the ground that the offence was committed with respect to a matter "over which the legislative authority of the Province extends"? Or would he be held as convicted of a crime, and so be out of reach of Provincial interference? That would raise the question directly, Can the Dominion Parliament make the breach of a Provincial Act a crime? Again, assuming the Dominion enactment to be valid, can the Province regain, so to speak, its jurisdiction by making the breach of the enactment an offence punishable by fine or imprisonment. In other words, can it withdraw the offence from the jurisdiction of the Dominion, and make it simply a violation of a Provincial Act and punishable as such? These are matters which still require clearing up, and we can only repeat that it is much to be regretted that the Dominion enactment respecting violation of Provincial Acts was not passed upon in the case just decided.

Supreme Court of Judicature Rules.

The Judges of the Supreme Court of Judicature for Ontario, on 13th September last, passed the following Rules:—

217. Rule 217 is amended so as to read, "The Divisional Court of the Chancery Division shall hold sittings commencing on the first Thursday in June, the first Thursday in December, and the third Thursday in February in each year."

191. Whereas under Rule 191 it is provided that the investment of the moneys in courts by the Toronto General Trusts Company shall be subject to the approval of the Official Guardian of the High Court of Justice for Ontario,

And whereas the said official guardian has expressed his desire to be relieved of the duty in question,

It is ordered, pursuant to sections 114 and 115 of the Judicature Act, that James S. Cartwright, Esquire, the Registrar of the Queen's Bench Division of the said High Court of Justice, be appointed in the place of the said Official Guardian to discharge the said duty, and that the said The Toronto General Trusts Company is to satisfy the said Registrar of the Queen's Bench Division of the security as to value and that he certify the same to the Court before cheques issue for each investment, and the said company are to pay into Court to the credit of the surplus interest fund the fees heretofore paid to the said Official Guardian by the said company in respect of said services.

72 *a*. No order for the administration of an estate in which an infant is interested shall be made until such infant is represented by the Official Guardian of the High Court of Justice, who shall be duly notified of the intended application.

BOOK REVIEW.

A Treatise on Private International Law, with principal reference to its practice in England. Third Edition. By JOHN WESTLAKE, Q.C., LL.D., Whewell Professor of International Law in the University of Cambridge; etc., etc. London: Sweet & Maxwell, Limited, 1890.

The third edition of this well-known book brings down the authorities to date, but, as the learned author says in his preface, the plan of the work is not changed. Little can be said of such a well-known work and one that has already established a reputation almost authoritative. The subject is treated as the title page shows, entirely from the English point of view. Its value and importance are not to be underrated on that account. On the contrary, bearing in mind the diversity of jurisdiction in the Empire, the English view of private international relations is naturally the prevailing one in colonial courts.

THE
CANADIAN LAW TIMES.

NOVEMBER, 1890.

THE RULE AGAINST PERPETUITIES (a).

NO trust can be valid which creates a perpetuity unless it be a charitable trust, which species of trust forms an exception to the general rule (b).

Mr. Challis referring to the rule in question, says:—"It is sometimes said that gifts to charitable uses are exceptions from the rule against perpetuities. But in this language there are plain traces of confusion between 'a perpetuity,' as used somewhat vaguely to denote some kind of perpetual ownership not sanctioned by the law, and 'the time within which executory limitations must vest in interest.' There is no reason to suppose that a gift made to charitable uses by way of executory limitation, if it be such as might by possibility not vest in interest within the specified time, is not void, like any other executory limitation" (c).

Christ's Hospital v. *Grainger* (1 Mac. & G. 460) would appear to show that this criticism is not aptly applied, and that a contingent remainder to a charity will be held to be good under circumstances in which the same remainder, if limited to an individual, would be void as being too remote; and as will hereafter be shown, the equitable doctrine as to

(a) This article consists of extracts from a course of lectures on Trusts delivered in the Law School at Osgoode Hall, Toronto.

(b) See *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460.

(c) Law of Real Property, 158.

perpetuity is identical with the rule prohibiting limitations on the ground of remoteness (*d*).

The term perpetuity is also used to denote that kind of perpetual ownership which is not sanctioned by the law, as, for example, a trust to maintain a library, or some other object, not being a charitable one, for a period exceeding that which is limited by the rule against perpetuities (*e*).

The rule as to perpetuities was settled in the case of *Cadell* v. *Palmer* (*f*) as being that no limitation by way of executory devise is valid if it is to take effect after a period exceeding a life or lives in being together with a term in gross of twenty-one years. The life or lives referred to may be the longest life of any number of living persons, and it is not necessary that such persons or any of them should have any interest in the property in question. To this it may be added that the rule in question applies to the vesting of all future interests, whether such interests be created by executed or executory trusts, or by executory devises, springing or shifting uses (*g*).

The period within which the vesting must take place is stated thus by Mr. Challis :—" A life, or any number of lives, in being—the life of a person *en ventre sa mere* being considered for this purpose a life in being—and twenty-one years after the dropping of the life, if only one, or after the dropping of the last surviving life, if there be more than one. And at the expiration of the aforesaid period, the executory interest may vest in a person *en ventre sa mere* " (*h*).

If no lives are fixed on then the term of twenty-one years only is allowed (*i*).

(*d*) See question discussed in *Gray's* Rule Against Perpetuities, Secs. 589 to 602.

(*e*) See *Re Dutton*, 4 Ex. D. 54; and *Thomson* v. *Shakespeare*, 1 DeG. F. & J. 399. Compare the case of *Gillam* v. *Taylor*, L. R. 16 Eq. 581, where the devise was held to be for a charity.

(*f*) 1 Cl. & F. 372.

(*g*) Challis' Law of Real Property, 149; and see *Thellusson* v. *Woodford*, 11 Ves. at pp. 145-6.

(*h*) Law of Real Property, 149.

(*i*) *Lewis* on Perpetuities, 172.

A trust created for the benefit of the children of an unborn child would be void and of course all subsequent limitations would be void (*j*).

In a deed the limitations are construed strictly, but in the *case of a will*, if there be a limitation of real estate to an unborn person, with a devise over to the issue of such unborn person as purchasers, the Court will apply the *cy pres* doctrine and will construe the first limitation as being one in tail (*k*).

The time fixed for the *vesting of the estate* or interest must be such that it will of necessity not exceed the period named in *Cadell* v. *Palmer*. If it may by possibility exceed that limit the trust or other limitation is void. Therefore a devise in trust for the first son of A., a living person, who shall attain the age of twenty-four years, is void (*l*).

If possible a meaning will be put upon the language used so that the rule against perpetuities will not apply (*m*).

Fry, J., says :—The rule against perpetuities requires in my view, the ascertainment within the period not only of the extreme limits of the *class of persons who may take*, but of the *very persons who are to take*, and that because the rule is aimed at the practical object of telling who can deal with the property, and if you cannot tell who are entitled to the property, but only who may become entitled to the property, the property is practically tied up (*n*).

If there be a limitation to a person which is void as transgressing the rule against perpetuities, *all subsequent limitations will be void* notwithstanding that they may be perfectly good in themselves, being such that if the obnox-

(*j*) *Hay* v. *Earl of Coventry*, 3 T. R. 86; *Moneypenny* v. *Dering*, 2 DeG. M. & G. at p. 170.

(*k*) *Forsbrook* v. *Forsbrook*, L. R. 3 Chy. App. 93; *Parfitt* v. *Hember*, L. R. 4 Eq. 443. As to the mode of carrying out executory trusts so as to avoid the objection of remoteness, see Gray's Rule against Perpetuities, sec. 418, note 1.

(*l*) *Newman* v. *Newman*, 10 Sim. 51; *Griffith* v. *Blunt*, 4 Beav. 248.

(*m*) *Martelli* v. *Holloway*, 5 E. & I. App. 532; *Hosea* v. *Jacobs*, 98 Mass. 65.

(*n*) *Blight* v. *Hartwell*, 19 Chy. D. at pp. 300-1; see *Curtis* v. *Lukin*, 5 Beav. 147.

ious limitation had not preceded them they would in no way have infringed upon the rule against perpetuities, and the property will in such case result to the heir or personal representative, or to the residuary legatee or devisee as the case may be (*o*).

But where a fund is left to trustees to apply in support of certain perpetuities and to apply the surplus for legitimate purposes, the Court will apportion the fund between the different objects, and as to those which are illegal the trust will fail. In such a case V. C. Kindersley said:—"The cases show that where a single fund is given for several objects of this nature and one of them is bad, the principle on which the Court acts is that, if it can be ascertained what are the proper proportions to be attributed to the several objects, it directs an inquiry on the subject; but if, from the nature of the gift, it appears impracticable to fix the proportions, the Court divides the fund equally between the different objects" (*p*).

Sir George Jessel, M.R., cites with approbation the definition of a perpetuity given by Mr. Sanders and by Mr. Lewis; the former is as follows:—"A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee simple of the property, discharged of such future use or estate, before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity," to which Mr. Lewis adds these words:—"In other words a perpetuity is a future limitation whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, ex-

(*o*) *Proctor* v. *Bishop of Bath*, 2 H. Bl. 358; *Beard* v. *Westcott*, T. & R. 25; *Re Thatcher's Trusts*, 26 Beav. 365.

(*p*) *Hoare* v. *Osborne*, L. R. 1 Eq. 588-9.

cept with the concurrence of the individual interested under that limitation " (*q*).

Professor Gray says:—" The true theory of the Rule against Perpetuities, so far as any artificial rule can be said to have a theory, is that no future interest must begin beyond lives in being. The question to be asked of any estate on condition precedent is:—' When must the contingency happen, if at all ? ' But the mistake which is constantly recurring and which has caused so much confusion, is that judges and legislators have considered, not when will the future estate begin, but how long will it be before an absolute fee can be conveyed. That mistake occurred here; the judges did not consider when the future estate would begin; they considered how long it would be before a fee simple could be conveyed, and they said:—' An executory devise may be postponed, it is conceded, to the end of a life estate. There can be no harm in extending the time till the person who takes the land on the termination of the life estate reaches twenty-one, for until he becomes of age he could not convey the land even if there were no executory devise.' This step the judges took, though unwillingly, in *Stephens* v. *Stephens*. And this is all for which they are really responsible. The allowance of a gross term can be traced to the unlearned peers overruling the sages of the law in *Lloyd* v. *Carew* " (*r*).

Lord Brougham says with regard to treating the period of twenty-one years as a term in gross:—" The judges held that this is now the law, whatever may have been its origin. It most clearly arises from a mistake. The law never meant to give a term of twenty-one years, much less any period of gestation. The law never meant to say that there shall be twenty-one years added to the life or lives in being and that within those limits you may entail the estate, but what the law meant to say was this;—until the heir of the last of the lives in being attains twenty-one, by law a recovery cannot be suffered and consequently the discontinu-

(*q*) See *London &c. Ry.* v. *Gomm*, 20 Chy. D. 581.

(*r*) *Gray's* Rule against Perpetuities, Sec. 187; and see Sec. 188.

ance of the estate cannot be affected, and for that reason, says the law, you shall have the twenty-one years added, because that is the fact and not the law, namely, that till a person reached the age of twenty-one years he could not cut off the entail. For that reason and in that way it has crept in by degrees: *Communis error facit jus*" (*s*).

Vice-Chancellor Sir William Page Wood lays down five rules relating to the doctrine as to perpetuities:—"The *first rule* is, that an executory devise is bad unless it be clear, *at the death of the testator*, that it must of necessity vest in some one, if at all, within a life in being and twenty-one years afterwards. * * * The *second rule* is that you must ascertain the objects of the testator's bounty by construing his will without any reference to the rules of law which prohibit remote limitations; and having apart from any consideration of the effect of those rules in supporting or destroying the claim arrived at the true construction of the will, you are then to apply the rules of law as to perpetuities to the objects so ascertained. *Thirdly*, if the devise be to a single person answering a given description at a time beyond the limits allowed by law, or to a series of single individuals answering a given description, and any one number of the series intended to take may by possibility be a person excluded by the rules as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one excluding others. * * * The *fourth rule* is, that where the devise is to a class of persons answering a given description, and any number of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, the same consequences follow as in the preceding rule and for the same reason. * * * The *fifth and last rule* to which I need advert is this:—that where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished, what-

(*s*) *Cole* v. *Sewell*, 2 H. L. C. at 233.

ever be the number of the other members, then the gift may be good as to those within the limits allowed by law" (*t*).

A *power of appointment* is void if it be given to a person who is not necessarily ascertainable within a life or lives in being and a further period of twenty-one years (*u*).

Where a conveyance of land contained a covenant by the purchaser that he would at any time thereafter, upon receiving six months' notice and upon being paid £100, reconvey the lands to the grantor, it was held that the covenant gave the grantor an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness, and that the covenant was therefore invalid (*v*).

This case shows that the rule as to perpetuities is not confined to legal or equitable estates in property but that it extends to equities which do not amount to an estate but are proprietory interests arising out of contract (*w*).

Where a conveyance of land contained a covenant on the part of the grantee that he, his heirs and assigns would not carry on certain trades upon the premises and that upon breach of this covenant the grantor should be at liberty to re-enter upon and occupy the lands, upon the question of the validity of the covenant arising before Mr. Justice North he said :—"It is to be observed that the power to re-enter, hold, possess and enjoy, is one which, according to its language, may come into operation at any time whatever, so that there is no limit of time fixed during which it is to apply—no limit to prevent its being a claim in perpetuity. The question is whether that is a power to which any effect can be given. I have been told that it is a nice point which will be raised, and will most probably be a matter of contest. But it does not appear to me to be a point admitting of any doubt," and he held that the power of re-entry was not binding on the grantee (*x*).

(*t*) *Cattlin* v. *Brown*, 11 Hare 375 *et seq.*

(*u*) *Re Hargreaves*, 48 Chy. D. 401.

(*v*) *London &c. Ry. Co.* v. *Gomm*, 20 Chy. D. 562. This case apparently overrules *Kendrick* v. *Dempsey*, 5 Gr. 584.

(*w*) *Ib.* 582, 586.

(*x*) *Dunn* v. *Flood*, 25 Chy. D. 629.

Where a testator bequeathed money to trustees, the interest of which was to be applied from time to time in keeping up the tombs of the testator and his family, it was argued that the bequest was a charitable gift and therefore did not fall within the rule as to perpetuities, but the Master of the Rolls held that a gift merely for the purpose of keeping up a tomb or building which is of no public benefit, and only an individual advantage is not a charitable use but is a perpetuity and is therefore void (*y*).

But where the bequest was to trustees to keep in repair forever an ornamental window to be placed by the trustees in a church, in memory of the mother of the testatrix, this was held to be a good charitable trust as being a gift to keep in repair a portion of the fabric of a church. So also was it held that a gift to keep in repair and ornament the chancel of the church was valid for there might be a good charity not only for the purpose of maintaining the fabric of the church but also for the purpose of maintaining the ornaments of the church (*z*).

In the same case it was said that a gift to keep in perpetual repair the monuments in Westminster Abbey or to keep in perpetual repair the organ or bells of a church, would be a good charitable gift; and accordingly a gift to keep in perpetual repair the monument of the mother of the testatrix which was within a church was held to be good, as such monument was a part of the ornamentation of the church; but a gift to keep in perpetual repair a vault not within a church, but in a church yard, was held not to be a charity and therefore to be void as transgressing the rule against perpetuities.

It is sometimes a matter of some difficulty to distinguish between trusts for private purposes and trusts for public charities. The house at Stratford-on-Avon known as the birthplace of William Shakespeare, and a small plot of contiguous land, were purchased out of a fund provided by

(*y*) *Rickard* v. *Robson*, 31 Beav. 244; *Fowler* v. *Fowler*, 33 Beav. 616; but see *Gray's* Rule against Perpetuities, Secs. 232 to 237*a* and 412, 413.

(*z*) *Hoare* v. *Osborne*, L. R. 1 Eq. 585.

public subscription, and conveyed to a body of gentlemen forming a committee, called Shakespeare's Birthplace Committee. The principal objects of the purchase were to restore the house in which the poet was born to the condition in which it was at the time of his birth, to isolate it and to found a museum in which all the editions of his works might be collected and which might also serve as a residence for the custodian of the house and museum. One John Shakespeare, by his will, made in 1856, bequeathed £2,500 to trustees to be laid out by them, with the concurrence of the said committee, in forming a museum at Shakespeare's house and for such other purposes as the trustees of the will should think fit for the purpose of giving effect to his wishes; and he also created a rent charge to be applied in paying the wages of a keeper or guardian whose duty it should be to attend the visitants and offer to them a bound up volume, with pen and ink, to inscribe on certain conditions, such lines in verse or prose as the fancy of each visitant might induce him to write.

This was held to be a private and not a charitable trust and to be void as creating a perpetuity (*a*).

The rule would appear to be that where an attempt is made to create a trust which upon its face purports to be one continuing forever, or continuing beyond the period fixed by the rule against perpetuities, the trust will be void if it appears that there will not necessarily be *cestuis que trust* who, within the period fixed by the said rule, will be entitled to call for the legal interest in the property and put the trust at an end; but if, on the other hand, it appears that there will of necessity be such *cestuis que trust*, who within the said period, being entitled to ascertained interests therein, may, as of right, convert their trust estate into an absolute legal interest the trust will be valid (*b*).

If real and personal property be devised and bequeathed to A. and the heirs male of his body, and in case he shall

(*a*) *Thomson* v. *Shakespeare*, 1 De G. F. & J. 399. And see *Carne* v. *Long*, 2 De G. F. & J. 75, and *Re Dutton*, 4 Ex. D. 54. But see *Gray's* Rule against Perpetuities, Secs. 232 to 237 and 412, 413.

(*b*) See *Gray's* Rule against Perpetuities, Secs. 120, 121, 675.

die without heirs male of his body, that it shall then go to B. the limitation of the real estate to B. is perfectly good, but B. will take no interest whatever in the personalty (*c*).

The bequest over of the personalty is invalid because the estate in remainder may not vest within the period limited by law. The devise over of the realty is good because the right to limit a remainder after termination of an estate tail is one of the recognized exceptions to the general rule as to perpetuities (*d*).

Powers of sale and of entry by a mortgagee also form an exception to the general rule (*e*).

So also do covenants in a lease to renew the same at the end of the term, and so also covenants in a lease for the perpetual renewal thereof (*f*).

A question has arisen whether a restraint upon anticipation by a married woman can form an exception to the rule relating to perpetuities. Such a restraint cannot be obnoxious to the rule if the instrument creating the restraint is confined in its operation to persons who are *in esse* at the date of the settlement, if the restraint is created by deed, or at the date of the death of the testator if the restraint is created by will (*g*).

The difficulty arises however where there is a restraint upon anticipation in a gift or appointment which may include unborn children.

In addition to the direct case of a gift with restraint upon anticipation to unborn persons, there may be a case where property is settled by marriage settlement for the benefit of a husband and wife and then on their children as they shall appoint. Such a power of appointment (*not being a general power*) would upon being exercised relate back to the time of the creation of the power; if, therefore, the rule as to

(*c*) *Dawson* v. *Small*, 9 Chy. App. 651.

(*d*) See *Challis'* Law of Real Property, 158; *Gray's* Rule against Perpetuities, Cap. XIV.

(*e*) *London &c. Ry. Co.* v. *Gomm*, 20 Chy. D. at p. 572.

(*f*) *Ib.* at p. 579; and see *Challis'* Law of Real Property, 151.

(*g*) *Herbert* v. *Webster*, 15 Chy. D. 610.

perpetuities applies to restraints upon anticipation, the parents in such case could not appoint the property in question to their children with restraint upon anticipation, for any such appointment would for the purposes of this rule have to be tested as of the date of the creation of the power, and such an appointment if made at that date would have been an appointment with restraint upon anticipation, to persons who were not then *in esse*.

Sir George Jessel, M.R., was strongly of the opinion that a restraint upon anticipation should form an exception to the rule against perpetuities, but he considered himself bound by the authorities, and held that such a restraint falls within the rule (*h*).

A. H. MARSH.

(*h*) *Buckton* v. *Hay*, 11 Chy. D. 645. See *Gray's* Restraints on Alienation, Secs. 272 to 272 *f*.

(To be continued.)

INCONSISTENCIES OF PRACTICE.

The dictum, "the practice of the Court is the law of the Court" is one calculated to infuse much satisfaction into the breast of the student and practitioner. This satisfaction may become somewhat tempered in the course of his experience when he ascertains that this "law of the court" is liable to variations, many of which, though perhaps not intrinsically important, are decidedly embarrassing.

Without entering upon the very broad sphere of practice as the same is contained in our statutes and rules and expounded in the reports, and merely confining one's self to the manner in which the business of the offices of the several Divisions at Osgoode Hall is carried on, there is still much which may confuse and perplex, and this very needlessly.

An outsider would consider that there was little difficulty in obtaining uniformity of practice in details, and that the several officers would be glad to meet and agree upon the simplest, cheapest and most expeditious way of transacting business in their offices consistent with the rules. It is matter of regret that this has never been done, and there can be no doubt that the public at large is a considerable sufferer.

It is an ungracious task in every respect to pick out all the weaknesses and faults of any system or work, of whatever kind it may be, and we can justify ourselves in this case only on the ground that some remedy may be provided if the facts are made prominent. A violent effort was made not long ago to render uniform the entire practice of the courts; but it was met by traditionary rules resting on nothing but tradition that were stronger than all the common sense that could be mustered on behalf of the reformers. In the most trivial cases the irritation is often the greatest;

and the most trivial excuses are often given for peculiarities of practice. To give one instance. After the consolidated rules came into force it was supposed that all judgments when signed would be delivered out. A very much respected officer on being asked for a judgment expressed first his surprise that such an important paper should leave his office, and then in a despairing tone exclaimed that if he gave out the "judgment roll" he would have nothing in which to keep the papers! The practice in that particular room had been for years to stuff the papers inside the judgment roll for safe keeping and convenience. This ground has finally prevailed and the judgments are still used as envelopes for the papers.

The differences detailed in the following pages are some of those which must be mastered before one can overcome the material resistance to the flow of justice.

Entering judgments.—Perhaps no more striking difference in practice exists than in the case of entry of judgments. In the Queen's Bench Division the original judgment remains in the custody of the court, and stamps to the amount of $1.70 are paid upon it, 10 cents of this being for the filing of the judgment. As the judgment is entered in the books of the court, the object of retaining the original and of the additional 10 cents tax is scarcely apparent.

In the Common Pleas Division the judgment is usually handed out, but in some cases is retained in the manner above alluded to, and in that event a fee of 10 cents is charged for filing.

In the Chancery Division all judgments are entered and handed out, and a uniform charge of $1.60 made upon them.

Fees on orders.—In respect of the fees charged upon orders, the difference is even more striking. What is termed an ordinary order, or rule, as it is sometimes called, of say two folios in length is, in the Queen's Bench Division, issued upon payment of 40 cents in stamps. The

same order or rule in the Common Pleas Division is issued upon payment of 50 cents in stamps, and in the case of an order of the same character in the Chancery Division, 80 cents must be paid.

The following table will shew the fees charged on court orders of different lengths in the different divisions:—

	$	c.
3 fols. Q. B. D.		80
" C. P. D.		80
" Chy. Div	1	10
6 fols. Q. B. D.	1	40
" C. P. D.	1	40
" Chy. Div.	2	10
7 fols. Q. B. D.	1	40
" C. P. D.	1	60
" Chy. Div	2	10
8 fols. Q. B. D.	1	40
" C. P. D.	1	80
" Chy. Div.	2	20
10 fols. Q. B. D.	1	40
" C. P. D.	2	20
" Chy. Div.	2	40
20 fols. Q. B. D	1	40
" C. P. D.	4	20
" Chy. Div.	3	40

It may be explained that much of this difference has its origin in the obscurity of the tariff. Upon every special order 20 cents a folio up to six folios is chargeable under the tariff, with an additional fee by statute of 20 cents on every such order, and further, 10 cents a folio for entry. Two of these modes of calculation must be wrong, and a uniform charge could easily be arrived at by a meeting of the registrars and taxing officers, and a reference to a Judge if no arrangement could be arrived at without. In the meantime either the Government or the litigants are losing money.

In the Chancery Division, the practice is to enter all special orders (the writer is at present speaking of court

orders merely); but the 20 cents a folio is not charged beyond six folios. The charge accordingly upon an order of twenty folios would be 20 cents upon six folios, $1.20; 20 cents additional fee by Statute, and 10 cents a folio for entering; in all $3.40.

In the Common Pleas Division, where no orders are entered, the 20 cents a folio is charged to the limit of the foliage of the order, and in addition the 20 cents additional fee by Statute. The 10 cents a folio for entering is not charged, as neither in this Division nor the Queen's Bench Division are orders entered.

In the Queen's Bench Division the 20 cents per folio fee ceases at six folios, and there is only therefore to be added the 20 cents additional fee by Statute. The result follows that in this Division the utmost that is charged for an order, whatever its length, is $1.40.

In the Common Pleas Division, in construing the rules and the tariff of fees, the expression "ordinary rule or order," is confined to orders of less than one folio in length. All orders exceeding this length, however ordinary they may be in their character, are denominated "special orders," and charged for accordingly.

Fees on Commissions —In the Queen's Bench Division the stamps demanded upon a Commission to take affidavits amount to $2.50, in the Common Pleas Division $2, it being there held that there is no provision for a charge for affixing the seal of the Court.

Reviving orders.—An order of revivor in the Chancery Division is entered at length and charged for accordingly. In the other Divisions such an order is not entered, and the fee upon it is 50 cents. In the Chancery Division it is obtained upon præcipe. In the offices of the other Divisions a person applying for such an order is required to file an affidavit setting out and verifying certain facts.

Form of orders.—As to the form of orders, there are small differences, which, though substantial, are decidedly annoying to the practitioner. Orders made in the Chancery

Division begin, "Upon motion made unto this Court," and the operative words are, "This Court doth order." In the other Divisions they are more frequently drawn, "Upon the application of," and the operative words are, "It is ordered," and in the latter case at the conclusion of the order the words are added, "Upon motion made unto this Court by Mr. —— of counsel for the ——."

Entering orders.—In the Queen's Bench and Common Pleas Divisions, although, as we have mentioned, orders are never entered, in nearly every case the officer requires a copy of the order to be left. This copy is not authenticated in any way and is not in any sense an original. In case of the loss of the original, it is therefore impossible to issue a duplicate, and from this circumstance grave difficulty has occasionally arisen.

Setting down.—Chamber appeals in the Queen's Bench and Conmon Pleas Divisions are not set down, but take their chances with the ordinary run of Chamber work. In the Chancery Division such appeals must be set down and a fee of 50 cents paid. The appeal is then entered upon a list and is heard in its turn.

As to setting down motions there are also marked differences. In the Chancery Division it suffices to put in a præcipe with the notice of motion, upon which a fee of 50 cents is charged. In the Queen's Bench and Common Pleas Divisions the notice of motion and proof of its service must be filed, and upon this filing there must be stamps to the extent of 20 cents or more. In addition to this a præcipe must be left and filed, and above all a fee of 50 cents is charged for setting down. In the Queen's Bench and Common Pleas Divisions any Court motion may be put upon the paper, and in fact the practice requires this to be done, although, from the circumstance that motions are called for independently of the paper, payment of fees for setting the motion down is, in some cases, avoided. It is the custom in the Chancery Division only to set down upon the Wednesday paper motions for judgment, motions for judgments on awards or reports, motions to set aside

awards, motions on further directions, petitions, demurrers and special cases. All other motions, except Court appeals to which a separate day is assigned, come on upon a different day, and will not be heard upon "Paper Day," except by special leave.

Settling judgments.—In the Chancery Division a judgment pronounced in Toronto is settled, signed and entered there. The principle upon which this is done is that the Registrar who hears the judgment delivered is best able to settle it. In the Queen's Bench and Common Pleas Divisions it is held that the judgment should be settled in Toronto, but no more. That being done, all the papers are sent back to the county whence they came for judgment to be formally signed and entered.

Divisional Court motions.—In the Chancery Division it is almost criminal to make a mistake. The merits of the case sink into comparative oblivion while the important question is discussed whether or not it is lawful to argue a case which has not been put on the paper. If a day should elapse after the date for giving notice of motion the aggrieved party is powerless unless he can prove that it was the fault of the other side that he could not get his notice in in time. In the Queen's Bench and Common Pleas Divisions solicitors are treated as being human, and so liable to err, and the rights of the litigants are not subordinated to the consequences of a formal mistake.

In the Chancery Division it is a domestic rule that the party applying to the Court to reverse or vary a judgment or for a new trial, must mark the passages in the evidence on which he relies. Presumably it is the intention of the Court not to read anything further unless a *prima facie* case of error in the judgment below is made out by the marked passages. The objection to this course is that the value of a portion of the evidence is not well determined in most cases, if separated from the rest. And it hampers the applicant in his efforts to get a full re-hearing of the case. In the other divisions no such practice prevails, and Counsel arguing a case before one of the other Divisional

Courts generally discovers that he is discussing evidence with the details of which the members of the Court are strikingly familiar.

Miscellaneous.—In many other trifling respects there are differences of practice, and it might be of service to refer to some of these.

In the Chancery Division an order for security for costs can be obtained by a defendant as soon as he is served with a writ. In the other Divisions he must first enter an appearance. In the Chancery Division writs of execution and commissions are written out by the clerks. In the other Divisions the solicitor must do this himself. Upon obtaining a certificate for registration of a judgment or order in the Queen's Bench and Common Pleas Divisions the judgment or order must be filed, and thus an important link in the title to land is taken from the party entitled to it, whereas in the Chancery Division it is handed to the officer with the præcipe and returned when the certificate is made out.

In the Queen's Bench and Common Pleas Divisions a præcipe must be filed where pleadings are amended. In the Chancery Division this is done without the filing of a præcipe, but upon payment merely of the tariff charges in respect of amendments. In the Chancery Division exhibits are handed out as soon as a case is disposed of, or, if judgment has been reserved as soon as it is given, contrary to the Rules. In the Queen's Bench and Common Pleas Divisions a consent or an order is required in pursuance of the Rules. In the Chancery Division all the papers in existence in a Toronto action will be found in the one office, and in the one bag. In the other Divisions the regular and ordinary papers will be found in the general office, Chamber proceedings in the custody of the Clerk in Chambers, papers used before a Judge in Single Court with the Clerk of Single Court, and lastly, Divisional Court proceedings in the files of the Registrar.

The order made by a Judge in Single Court upon an application for judgment is, in the Queen's Bench and Com-

mon Pleas Divisions, intituled "an order for judgment," and is entirely independent of the judgment which may be entered upon it, or the applicant may at his election treat it as a judgment. In the Chancery Division there is no separate order for judgment, but the judgment is at once drawn and issued.

Finally, when ingenuity is almost exhausted in harassing the practitioner, and he fancies that he has surmounted every obstacle, he is told in the Chancery Division that his papers must be folded lengthwise, while in the other Divisions they must be folded crosswise; otherwise the traditions of the several rooms where they repose will be violated.

The above are a few of the discrepancies which disfigure the practice at Osgoode Hall, and which render the life of a student miserable. There may be, and no doubt are, many others. It is not our object to collect these, and fortunately there is no obligation upon us to endeavour to explain the reasons of their existence.

The above is written with the double object that it may be of some service to those who find the details of practice perplexing, and that it may possibly induce a consideration by the officers or the Judges of these matters, and as an outcome of such consideration some advance in the direction of uniformity, expedition and cheapness in our practice.

ANONYMOUS.

EDITORIAL REVIEW.

Seduction Under Promise of Marriage.

It is reported that at a recent assize a ruling was made to the effect that unless the offence of seduction is committed at or about the time of a promise of marriage, or as a direct consequence thereof, the offender cannot be convicted. In other words the seduction must be the immediate sequence or consequence of the promise. This interpretation involves such grave consequences that one would have expected that the point would have been reserved for the opinion of the court. It practically nullifies the enactment.

The words of the act are as follows :—"Every one above the age of twenty-one years who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under eighteen years of age, is guilty of a misdemeanor, and liable to two years imprisonment." R. S. C. c. 157, s. 4.

The question depends upon the meaning to be put upon the phrase "under promise of marriage," as it stands in connection with the surrounding enactment. It may be taken as a general rule for the interpretation of a statute that if one interpretation will render it practically ineffectual, and another effectual, the latter is the proper construction. Hitherto, the ordinary or vernacular meaning of the enactment has been considered the correct one, namely, that one who has gained the confidence of a chaste female and has made use of it to betray her, is guilty of the offence, whether he based his design upon the promise itself when first given, or conceived the idea after having established the relationship. No doubt this was the original intention in passing the enactment. The proof of the promise being made, the confidential relationship is established; the intimacy which follows naturally affords

opportunities to the man for accomplishing his design that he might not otherwise have. The consummation being effected, a jury is at liberty to draw inferences as to his design. Very slight evidence of intent to commit a felony justifies a jury in convicting of burglary, where there is no actual commission of a felony after the breaking and entering. And so a jury might on slight evidence inferentially connect the seduction with the original promise, if that is necessary on the true construction of the Act. In this view it would be question of fact to go to the jury; and it would not be permissible to withdraw the case on the ground that there was no definite proof of the consent to illicit intercourse having been given in consideration, so to speak, of the promise.

It is quite possible to imagine a case in which by unimpeachable evidence the accused might prove that he had the most delicate feelings at the beginning of his engagement, and might prove to the satisfaction of reasonable men that the seduction did not follow as an immediate consequence of the promise. Ought he to be acquitted because he only discovered during the engagement that he might accomplish his purpose?

On the other hand it might be established satisfactorily that from the inception of the relationship he conceived the design of betraying the woman, but did not succeed for a considerable length of time. Ought he to be acquitted because there is no proof of the woman's assent having been given in consequence of the promise?

Generally speaking, the intent is to be inferred from overt acts. But the proof of the promise the respective ages and the seduction would show an intent. To require proof of the interchange of promise and assent to carnal knowledge as definitely related acts would necessitate such a reading as this :—"Every one who with intent to seduce a previously chaste female procures her assent under a promise of marriage, etc."

If it is necessary to confine the Act to such narrow limits, how can corroborative evidence be given? By the

6th section, "No person shall be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused." The woman is the chief witness; the promise of marriage an essential element, a material particular. If there is corroborative evidence of the promise, is it not sufficient, the seduction being also proved? If the offence is not seduction during the period of the engagement, but seduction and carnal knowledge in consequence of giving a promise to marry, then the most material part is the bargain, and the offence could not be proved at all unless the actual bargain were proved. Corroboration of the promise and the seduction would not avail at all if the essential ingredient of the offence were not proved; and corroborative evidence of such a bargain it would be almost impossible to obtain, unless the lady took care to have her "corroborator" at hand when she expected the final arrangements to be made. If the offence is as suggested, carnal knowledge in consideration of a promise, either it would leave the accused liable to be convicted on the unsupported testimony of the woman as to the alleged bargain made, if only some corroborative evidence of the carnal knowledge or promise were given, or it would render it impossible for the prosecution to prove the offence, if corroboration of the only material part of the offence were required, namely, the bargain.

The Act is susceptible of this meaning, that one who under cover of a promise of marriage, or while he is under a promise of marriage, seduces a previously chaste female, is guilty of a misdemeanour. If the only material particular, apart from the respective ages of the parties, are the previous chastity, the promise and the seduction, corroborative evidence is as readily obtainable as in a case of breach of promise of marriage. But if the Act is narrowed down to mean that he who by giving a promise of marriage induces a woman to assent to his carnally knowing her, then the material particular is that he induced her assent by the promise—that becomes the offence—and when can it be proved?

Quiet Enjoyment.

A landholder in a small way, near Toronto, was letting his land to tenants in lots of five acres. To one he let five acres for a market garden, and to another the adjoining five acres which the tenant proposed to use for keeping and breeding poultry. He expected to have five hundred of the feathered tribe always at large upon his holding, reproducing their kind, and otherwise employing and enjoying themselves. The landlord felt the responsibility of planting a poultry-breeder so near a market gardener, and having expressed his anxiety to his solicitor, gave him instructions to acquaint the market gardener of the fact before he signed his lease. Having heard with satisfaction also the covenants to be made by the poultryman, not only for himself but also for his executors and sundry others, to indemnify him, etc., (covenants which, by the way, are quite ineffectual to shorten the wings or dull the appetite of a hen), he proceeded to hear read to him the lease to the market gardener. As the solicitor wound his devious way through reddendum, covenant and proviso, the landlord grew weary and began to look drowsy, when suddenly, as the end approached, he was startled to hear the familiar words of the short form covenant proceeding with dreary monotony from the solicitor's lips: "The said lessor covenants with the said lessee for quiet enjoyment." Starting from his chair he said, "What's that about quiet enjoyment? Ain't that hennery to be next door? D'ye think I'm goin' to guarantee that man a quiet time when five hundred hens and roosters wake up in the morning? Not much! Scratch that out, please!"

This is but one more instance of the obscurity and misleading effect of the Short Forms Act.

Appointed Against Elective Judges.

A reviewer in the *American Law Review* for July-August pays a high tribute to the Bench of Canada, referring to the education and discipline of the Bar, which of course contribute to the excellence of the Bench. The term of

office being "during good behaviour," the Bench is above the influences of popular clamour or the impressions of the hour.

In the following number critical reference is editorially made to the elective system of the States, which is lauded by a contributor to the *Green Bag* as producing more good Judges than the system by appointment would have produced. No doubt many good men have been elected by the people; but was it a beneficial result when at an election in Illinois Judge Cooley retired before the popular wave which carried on its crest a man who before the election was quite obscure as a lawyer. If we mistake not, it is not long since the contributor to the *Green Bag* found fault with the system of levying contributions on the candidates for judicial office in order to secure the support of the party—a system which seems to be the inevitable result of party government. Will a Judge who pays to secure his nomination and election inspire confidence?

THE

CANADIAN LAW TIMES.

DECEMBER, 1890.

THE RULE AGAINST PERPETUITIES.

(*Concluded.*)

IT would appear to be not quite settled by authority whether the rule against perpetuities applies to the grant of an estate, upon condition of the continuance or non-existence of a certain state of facts; for example, a grant or devise to a man upon condition that the property shall never be sold out of the family of the grantee or devisee. Sir George Jessel, M.R., says that such a condition would be void as infringing upon the rule against perpetuities; but numerous American decisions on the other hand hold that conditions are not subject to the rule against perpetuities (*a*).

It is questionable whether resulting trusts come within the operation of the rule, but they probably do come within it (*b*).

Mr. Justice Kay says, "*A contract not creating any estate or interest properly so called in property* at law or in equity, is not, in my opinion, obnoxious to the rule. For instance, a covenant to pay £1,000 when demanded, with interest meanwhile, if not barred by the Statute of Limitations, might be enforced by an action of covenant at any time. A contract to buy or sell land, and covenants restricting the use of land, though unlimited, are not void

(*a*) See *Re Macleay*, L.R. 20 Eq. 186-190; Gray's Restraints on Alienation, sec. 42, note 1, and sec. 51; and *Re Rosher*, 26 Chy. D. 821 *et seq.*

(*b*) Gray's Rule Against Perpetuities, sec. 327.

for perpetuity. In these latter cases the contracts do not run with the land, and are not binding upon an assign unless he takes with notice. They are not, properly speaking, estates or interests in land, and are therefore not within the rule" (*c*).

The Court of Appeal agreed with Mr. Justice Kay in thinking that a contract not creating any estate or interest properly so called in property, at law or in equity, is not obnoxious to the rule, but that court did not agree with him in thinking that a contract to buy or sell lands and covenants restricting the use of land, do not create such an estate or interest in lands as would cause such contract or covenant to fall within the operation of the rule.

In *Gilbertson* v. *Richards* (*d*) a question of great importance was raised which has only recently been settled. In that case one Billings, being entitled to the fee simple of certain lands, agreed to sell them, subject to the payment by the purchaser to him of £40 a year, for which he was to have a power of distress. Then he and the purchaser mortgaged the property by a deed which contained a proviso that if the mortgagee or any one claiming under him should ever enter into possession, the premises should thenceforth be charged with the payment to Billings, his heirs and assigns of the annual sum of £40. It was argued that this was void for remoteness. That argument was answered by Baron Martin thus:—"The second objection was that it was void for remoteness; that it was to arise at any time however distant when the parties of the fourth part, or their heirs, might enter into the land, and therefore might arise long after the time prescribed by law against perpetuity. It is quite true that no rent can be lawfully created which violates the law against remoteness, and therefore a rent could not be granted to the son of an unborn son. But it seems to be an error to call this rent a perpetuity in an illegal sense. It is vested in Thomas

(*c*) *London, &c., Ry. Co.* v. *Gomm*, 20 Chy. D. 575-6, and see also Gray's Rule Against Perpetuities, sec. 329.

(*d*) 4 H. & N. 227; 5 H. & N. 453.

Billings and his heirs. He or his heirs may sell it or release it at their pleasure. A rent in fee simple may be granted to a man and his heirs to continue forever. Why therefore may not one be granted to commence at any time, however remote? It is only part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be *in esse* until after the line of perpetuity be passed, but when the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his or her pleasure and as he or they think fit, we think it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time however distant."

This view of the law is sustained by Mr. Justice Fry, who says:—"I think that whenever a right or interest is presently vested in A. and his heirs, although the right may not arise until the happening of some contingency which may not take effect within the period defined by the rule against perpetuities, such right or interest is not obnoxious to that rule and for this reason: the rule is aimed at preventing the suspension of the power of dealing with property—the alienation of land or other property. But when there is a present right of that sort, although its exercise may be dependent upon a future contingency, and the right is vested in an ascertained person or persons, that person or persons concurring with the person who is subject to the right, can make a perfectly good title to the property. The total interest in the land, so to speak, is divided between the covenantor and the covenantee and they can together at any time alienate the land absolutely" (*e*).

Mr. Justice Kay does not agree with this view of the law and says:—"In my opinion a present right to an interest in property which may arise at a period beyond

(*e*) *Birmingham Canal Co.* v. *Cartwright*, 11 Chy. D. 432-3.

the legal limit is void notwithstanding that the person entitled to it may release it" (*f*).

Mr. Justice Kay's opinion upon this point was sustained by the Court of Appeal (*g*).

Vested interests, whether legal or equitable, and whether in goods or chattels, do not fall within the rule, and as reversions are vested interests the result is that the rule in question has no application to reversions and vested remainders; and a remainder is said to be vested if it is subject to no condition save the determination of the preceding estates. Contingent remainders on the other hand are subject to the rule in question (*h*).

"If a remainder is vested, that is, if it is ready to take effect whenever and however the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being. For instance, if an estate is given to the unborn child of A. until he dies or changes his name, then to B. and his heirs, B. has a vested remainder, for he will take the estate whether the child dies or changes his name, although the contingent determination of the estate before the child's death depends upon an event which may not take place until beyond the limits prescribed by the rule against perpetuities. And it makes no difference whether the provision for termination be expressed in the form of a condition or a limitation, so a remainder to a person ascertained and his heirs after a term of years however long the term or whatever be the conditions to which the term is subject is not too remote (*i*).

"There can be no remainder after a fee simple; a remainder after a fee tail is destructible; a remainder after life estates vests in possession at the end of life interests

(*f*) *London, &c., Ry. Co.* v. *Gomm*, 20 Chy. D. 573; and see Gray's Rule Against Perpetuities, secs. 268-269.

(*g*) *London, &c., Ry. Co.* v. *Gomm*, 20 Chy. D. at pp. 577, 582, 588, and see Gray's Rule against Perpetuities, secs. 284 to 298.

(*h*) Gray's Rule against Perpetuities, secs. 101, 205, 116, 117, 321. See article in 6 Law Quart. Rev. at pages 415-7, but see same article, pages 26-7.

i Gray's Rule against Perpetuities, sec. 209.

which must begin within the limits of the rule against perpetuities; but a remainder after a term for years may not come into possession for centuries. Here there seems an opportunity for abuse. If an estate is devised to A. and his heirs, but if he or they ever change their family name, then to B. and his heirs, the gift to B. is an executory devise and is too remote. But suppose an estate is devised to A. for a thousand years unless A. and his heirs sooner change their name; and subject to the term the land is devised to B.; here B. has an interest theoretically vested, but practically contingent upon A. and his heirs changing their name; an event which may be very remote. The trouble arises from terms being sometimes of extravagant length (*j*).

The limitation lastly mentioned would be good because conditions in defeasance of a term of years do not fall within the operation of the rule against perpetuities, but form an exception thereto (*k*).

In the case of a trust created by a will the Court will look at the state of things existing at the death of the testator for the purpose of determining whether the beneficial interest must of necessity vest within the period limited by law. Thus in the case of *Southern* v. *Wollaston* (*l*) there was a bequest to trustees for a man for life and after his death to divide the fund among his children who should live to attain twenty-five. Upon the face of the will, and without any evidence of surrounding circumstances, this limitation is clearly too remote, but the Master of the Rolls found that at the time of the death of the testator the tenant for life was then dead, and that the tenant for life had died so many years before the testator that every one of his children must attain the age of twenty-five years within twenty-one years after the testator's death, and consequently the bequest was held to be effective (*m*).

(*j*) Gray's Rule against Perpetuities, sec. 210; and see Challis' Law of Real Property, 151.

(*k*) See Challis' Law of Real Property, 151.

(*l*) 16 Beav. 276.

(*m*) See *Re Dawson*, 39 Chy. Div. 155.

It has been contended that where a general power of testamentary appointment is given to a person, the time which is allowed to run under the rule against perpetuities must be computed from the date of the instrument creating the power, and not from the time of the death of the donee of the power; thus drawing a distinction between general powers of appointment which may be exercised by deed or will (which are equivalent to ownership), and general powers of appointment by will alone, and so it was contended that where the donee of a general power of testamentary appointment appointed the property in question by her will to persons who were unborn at the time of the creation of the power, in such a manner that the estate would not vest within the period limited by the rule under discussion if that period were computed from the date of the creation of the power, and not from the time of its exercise, such appointment would be invalid as infringing upon the rule against perpetuities. The contrary, however, has recently been held in England, and the rule laid down that the running of the period is to be computed from the date of the exercise of the power and not from the date of its creation (*n*).

Although a power may authorize an appointment in such terms that an appointment creating a perpetuity might fall within the scope of it, yet if the appointment be in fact made within the limit of the rule as to perpetuities, it will be a valid appointment.

Lord Cairns, L.C., dealing with this question says:—"There is no doubt that, under the power which the original testator by his will gave to his grand daughter, she might have given a power to appoint to children born after his death, and might therefore, have contrived to give interests which would be void under the rule against perpetuities. But it does not follow that because the original power might have been badly exercised, yet, if it be so exercised as not to infringe the rule, the possibility of its being exercised in another way would make the power void (*o*).

(*n*) *Rous* v. *Jackson*, 29 Chy. D. 521; but see 3 Harv. Law Rev. 139.

(*o*) *Slark* v. *Dakyns*, L. R. 10 Chy. 39; and see Gray's Rule against Perpetuities, sec. 510 *et seq.*

Mr. Butler, in a note to Coke on Littleton, clearly draws the distinction between those powers, the exercise of which relate back to the time of the creation of the power and those which do not so relate back. "By a series of cases it now appears to be settled that *where the power is general*, estates for life, with remainders over to their issue in strict settlement, may be limited under them to persons not *in esse* at the time of the execution of the original deed, in the same manner, and to the same extent, as if instead of being derived out of the seisin of the feoffees of the original deed, and in that point of view, as making a part of that deed, the uses and estates so limited were created by an original, substantive, independent and integral conveyance. On the other hand *in the case of a particular or qualified power*, that is, where the objects are qualified, as a power of appointing to the children of the party himself, though perhaps it may enable him to appoint life estates to children unborn at the date of the deed creating the power; yet, if it enables him to appoint life estates to those children, it certainly does not authorise him to extend the appointment to the children of these children so as to make them take by purchase, nor to appoint any other estate, which might not have been created by the very deed creating the power. *In all cases therefore of particular or qualified powers, both in the creation and the exercise of them, care should be taken to ascertain that the uses which the party is empowered to raise under them, or actually assumes to raise under them, when he comes to exercise the power, are such as the deed creating the power might itself have raised.*

It may, however, be proper to add that between deeds and wills there is this material distinction; a deed takes effect immediately upon the execution of it; a will is ambulatory, and waits for its effect till the testator's decease. In inquiring therefore into the legality of the limitations we are speaking of, the reference in the case of a deed should be to the time of its execution; but the reference in the case of a will should be to the death of the party. If, therefore, in a *deed* exercising such particular power of appointment, there is a limitation for life to a

person unborn at the date of the deed creating the power, with remainders over to his sons in strict settlement, these remainders over will be void and will not be helped though a son is born on the following day. In the case of a *will* it is different; if the son is born in the party's life, he is capable of a limitation to himself for life, with remainders over to his sons in strict settlement" (*p*).

The same learned writer says: "The utmost stretch towards a perpetuity which the Courts have hitherto allowed, is through the medium of an exercise of a power of appointment limited in a deed or will. *If the objects of the power be not restrained to any particular description of persons*, but designed generally to be such persons as the party to whom the power is given shall appoint, there is no question but he may appoint life estates with remainders over in the same manner as he might do by a substantive original conveyance, notwithstanding the persons to whom the life estates are appointed were not in existence at the time of the execution of the conveyance in which the power is contained. But it seems to be otherwise *if the objects of the power are restrained to any particular description of persons*, as to the children of the appointer" (*q*).

In *Frost* v. *Frost* (*r*) Mr. Justice Kay quotes Butler's note to Fearne on contingent remainders as follows:—"No question of perpetuity could arise at the common law, or under the Statute *De Donis*. It has been shown that after the Statute *De Donis* and before the introduction of executory uses, future estates could only be created by way of remainder. The remoteness of a remainder, however great, was no objection to it on its creation. If the event, upon which it was to vest, took place during the continuance of the preceding estate, or at the instant of its determination, the remainder would vest in possession immediately on the determination of the preceding estate; if the event did not take place during the continuance of the preceding estate,

(*p*) Co. Litt. 272*a*. note (1) VII. 2.
(*q*) Co. Litt. 379*b*. note 1.
(*r*) 43 Chy. D. 252.

or at the instant of its determination, the remainder would wholly fail of effect; during this period, therefore, of our law, all inquiry respecting perpetuity was out of the question. The cases of a possibility upon a possibility may be considered as exceptions from the rule. They proceeded on a different ground, and gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited, so as to confer an estate by purchase on that person's issue."

Mr. Justice Kay adds:—"There are limitations which would have been void under the old law, because they would have been treated as possibilities upon possibilities. The like limitations would now be void but perhaps for a different reason, namely, because they offend against what in more modern law we call the rule against perpetuities" (*s*).

Still more recently the Court of Appeal has held that the old rule against "a possibility on a possibility," applicable to legal limitations of real estate, namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person as purchasers, is still existing and has not been abrogated by the more modern rule against perpetuities, which prohibits property being tied up for a longer period than a life or lives in being and twenty-one years afterwards, the two rules being in fact independent and co-existing (*t*).

Lord Justice Lindley referring to the rule against a possibility upon a possibility says:—"The rule against perpetuities was invented much later, on account of the law of shifting uses and executory devises. When shifting uses and executory devises were invented it became necessary to impose some limit upon them, and the doctrine of perpetuities has arisen from that necessity. The old rule against double possibilities is a rule that has not been abrogated, and it is founded on very good sense; because

(*s*) 43 Chy. D. 254.

(*t*) *Whitby* v. *Mitchell*, 44 Chy. D. 85. See a criticism of this case in 6 Law Quart. Rev. 410.

it is not desirable that land should be tied up to a greater extent than that allowed by the rule " (*u*).

"The law does not recognize dispositions which would practically make property inalienable for ever. Contingent remainders were introduced, which had the effect of rendering property inalienable. The doctrine of contingent remainders was discussed by the chancellors, who held that a remainder depending upon what was called a possibility on a possibility was contrary to the common law. That was a wholesome rule, only it was considered that it did not go far enough. The result was that the chancellor established this rule in favour of alienation, that property could not be tied up longer than for a life in being and twenty-one years after. This is called the rule against perpetuities " (*v*).

Mr. Scott in his work on Trusts for Accumulation (section 31) after referring to the rule against perpetuities says :— "Besides other interests subject to the rule, the rule governs all future equitable interests either in real or personal property, not vested. 'There are strictly speaking,' says Mr. Gray (*w*), 'no equitable reversions or remainders. The so-called reversions are resulting trusts, and a remainder implies the presence of seisin and tenure, which are conceptions foreign to equitable interests. But to determine whether equitable interests are vested, for the purpose of judging of their remoteness, they are to be considered as if they were legal interests.' The test to be applied is 'would they be vested if they were legal limitations of realty?' Therefore all future equitable interests either in real or personal property, which, if they were legal interests in reality would be reversions and vested remainders, are for the purpose of the rule against perpetuities to be considered vested interests. All other future equitable interests are not vested."

Mr. Challis presents an argument that the rule against perpetuities does not apply to legal limitations made by

(*u*) *Ibid.* 92.
(*v*) *Per* Jessel, M.R., in *Buckton* v. *Hay*, 11 Chy. D. at 649.
(*w*) Gray on Perp., sec. 116.

way of remainder, and he suggests that any objection against the validity of a contingent remainder grounded upon the rule against perpetuities, is not so much an objection against the time of the vesting of the remainder, as an objection against the duration of the precedent estate (*x*).

This view does not meet with the approval of Mr. Justice Kay, who says :— "Lord St. Leonards in *Cole* v. *Sewell* (*y*) used language which has been read as meaning that the doctrine of remoteness never could apply to a contingent remainder; and the same language, or something like it, is also used in what I have read from Butler's note. But in every one of these cases the language refers simply to the case of an estate for life or an estate tail limited to a person *in esse* when the limitation takes effect. If this is so, it is quite clear that no contingent remainder to take effect upon the determination of that estate could be exposed to any objection on the ground of being too remote. But none of that language contemplates the case of there being interposed a possible estate for life to a person not in existence and a contingent remainder over on the death of that person. However, I do not at all agree that under the law of the present day there cannot be any application of the rule against perpetuities to remainders" (*z*).

It has been suggested that the rule in question, being the legal doctrine governing the creation of future interests in property, should have been called the rule against remoteness instead of the rule against perpetuities; for it is aimed at the control of future interests, and it has nothing to do, save incidentally, with present interests. It is therefore objected that the name of the rule is misleading, as it affords a constant temptation to treat it as aimed against restraints on the alienation of present interests.

It will be seen, however, that there are really two classes of cases which are treated by both judges and text writers

(*x*) Law of Real Property, 159-61; see Gray's Rule Against Perpetuities, sec. 284 *et seq.* and 298, note 1.

(*y*) 4 D. & War. 28.

(*z*) *Frost* v. *Frost*, 43 Chy. Div. 253-4; and see *Whitby* v. *Mitchell*, 44 Chy. D. 85. See also *Abbiss* v. *Burney*, 17 Chy. D. 211, which was a case of equitable limitation.

as falling within the rule against perpetuities. The one class consists of cases in which an attempt has been made to postpone the vesting of an estate until after the time limited by law for the vesting to take place, if it takes place at all. This is the most numerous class and the criticism in question would seem properly to apply to this class, the cases falling under which may be said to be cases of infringement upon the rule against remoteness.

There is another class, however, comprising cases of perpetual trusts for private purposes, as distinguished from trusts for public charities. *Re Dutton* (*a*) and *Thomson* v. *Shakespear* (*b*) are examples of this class, and the rule there applied may with propriety be called the rule against perpetuities.

"The rule against perpetuities is sometimes spoken of as aimed at restraints against alienation. In a sense this is true. Executory devises and other future interests to limit which is the object of the rule, render an estate less marketable, and therefore the rule does, to this extent, favour alienation. But, speaking strictly, and as the expression is used here, a future interest is not a restraint on the alienation of an estate unless the contingency on which the future interest depends is itself the alienation of the estate. The owner of an estate subject to a future interest can grant all that he has got, and the grantee has everything that the grantor would have had if the transfer had not been made" (*c*).

A. H. MARSH.

(*a*) 4 Ex. D. 54.
(*b*) 1 De G. F. & J. 399.
(*c*) Gray's Restraints on Alienation, sec. 8.

AN EXECUTOR'S DEFENCE AT LAW.

An executor was usually a well protected individual when dealt with in equity, but at common law he was treated with some rudeness. Whether the motive was the reputed jealousy of the common law Judges towards creatures of equity, or whether it was the result of the refreshing directness of an action at law as compared with the insatiable greed for parties and remedies of the old Court of Chancery it is hard to say; but there is no doubt of this, that the position of an executor or administrator in an action brought against him at law used to be precarious.

Whatever he had done was scrutinised, and the question as to whether he had assets enough to pay the debt was often answered in the affirmative, or presumed against him, from innocent though equivocal acts. He had to be ready to shew to a rapid Assize Judge and an exasperating counsel just what he had done with everything that the law said had come into his hands. Often when he simply had the temerity to deny the debt, or where, in his desire to throw no obstacle in a creditor's way, he suffered judgment to go against him, he was held to admit assets and was therefore liable whether he actually had the wherewithal or not. The foundation of his responsibility was of course the possession of assets, whether actual or presumed, and by a proceeding which finds its parallel in more modern times in actions against married women, the creditor sought in an action at law against an executor to find out the goods, chattels, or lands against which he might have judgment. Hence the importance of being able to shew that all the estate was duly administered, or that what was reserved was intended for the payment of debts which had a higher claim than that of the suing creditor. At the present time the law relating to these actions is in a rather perplexing state, partially induced by the passing of the Statute 29 Vict. cap. 28, sec. 28, now R. S. O. cap. 108, sec. 32, and the purpose of the

present article is to enquire whether that section enables the executor of an insolvent estate to make an effectual answer to an action against him for a debt, such as was not possible before its passing.

Before the statute referred to there was a well recognised course of administration in which, without descending to details, bond and specialty debts and judgment debts were entitled to be paid before simple contract debts. The desirability therefore of getting an ordinary debt transformed into a judgment debt became at once evident.

In England an Act was passed in 1869 putting bond and specialty debts on the same footing as simple contract debts. Even this did not reduce judgment debts recovered against executors or administrators to the ordinary level, but left them to be paid in full priority to all others (*a*).

This was followed by the passing of the Supreme Court of Judicature Act 1873, sec. 25 (Imperial), which provided that the same rules in the administration of the estates of insolvent deceased persons should prevail as to the respective rights of secured and unsecured creditors as might for the time being be found in the Bankruptcy Acts. This provision was re-enacted in section 10 of the Judicature Act of 1875 (Imperial), and at first sight it appears to have introduced the principle of equality. It was therefore argued that the executor's right of retainer was abrogated (*b*) and that creditors who had recovered judgment against the personal representative were now to be paid *pari passu* (*c*), but in each of these cases the attempt was unsuccessful. It was pointed out in *Re Maggi* that the wording of the enactment did not render it possible to include section 32 of the Bankruptcy Act, which required all debts to be paid equally (with some unimportant exceptions), and that it was limited in its effect to disabling a secured creditor from proving for more than the balance of his claim.

(*a*) *Williams* v. *Williams*, L. R. 15 Eq. 270.

(*b*) *Lee* v. *Nuttall*, L. R. 12 Chy. D. 61.

(*c*) *Smith* v. *Morgan*, L. R. 5 C. P. D. 337; *Re Maggi*, L. R. 20 Chy. D. 545.

It therefore remains possible in England for a personal representative to answer an action by a simple contract creditor by saying either that he had fully administered or that the assets he still had were reserved for, and would be absorbed by, judgment creditors, or were retained by him for his own debt.

In Ontario the law is more favourable to an equal distribution, but the cases appear still to leave the executor or administrator open to a creditor's action, and in the singular position of being obliged to suffer judgment without the right to pay it and then treat that payment as a proper administration *pro tanto*. Our section is as follows:—"On the administration of the estate of a deceased person, in case of a deficiency of assets, debts due to the Crown and to the executor or administrator of the deceased person, and debts to others including therein respectively debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts, shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another; but nothing herein contained shall prejudice any lien existing during the lifetime of the debtor or any of his real or personal estate."

This Section was first considered in *Bank of B. N. A.* v. *Mallory* (*d*) and it was there pointed out by Spragge, C., that it contemplated an administration out of court in which the priority of judgment creditors, and of an executor in respect of his debt, were abolished, and a scheme of distribution adopted, comprehensive in its scope, and based only upon the equality of all creditors.

But he did not overlook the difficulties in working this out. One chief obstacle was that real estate was not then assets in the hands of an executor, although it was assets for the payment of debts (*e*). And while an executor could admit that his testator died seised of lands, he

(*d*) 17 Gr. 102.

(*e*) See per Draper, C.J., in *Mein* v. *Short*, 9 C. P. 244 at p. 24-5.

could succeed in proving his plea of *plene administravit* if he shewed a complete distribution of the personal estate. The creditor suing could however have his judgment against the estate of the testator, and execution upon such a judgment would become a lien upon the testators' lands (*f*). Now by this statute execution creditors were deprived of this lien and were placed upon the same footing as ordinary creditors while the executor had no power to deal with the lands as part of the assets to be distributed. After a faint attempt to suggest the Sheriff as the proper functionary to step in and solve the difficulty under the Interpleader Act, the learned Chancellor, with perhaps good natured malice, hints that the eager but now disappointed execution creditor may "cool off" in the recesses of a Chancery suit for administration.

In 1872 an executor's position under this statute was again considered in *Donor* v. *Ross* (*g*) where judgment was allowed to go by default. Spragge, C., points out that, under the old law, suffering judgment by default was an admission of sufficient assets to satisfy the plaintiff's debt, but that now it must impliedly be an admission of more than that, for he could not now have sufficient assets to pay the plaintiff's debt unless he had sufficient to pay all, inasmuch as all are to be paid *pro rata*. The executor must therefore plead a deficiency of assets to pay all debts or apply to the Court of Chancery for an administration order. As however the executor did not plead, the decision practically held him not entitled to credit for the amount recovered by the suing creditor over and above his *pro rata* share, for no doubt though personally liable upon the judgment the *pro rata* share would be properly chargeable against the estate by him.

In *Parsons* v. *Gooding* (*h*), Wilson, J., adopts the suggestion made in *Bank of B. N. A.* v. *Mallory*, and says that the sheriff is bound to pay the creditors according to the

(*f*) *Mein* v. *Short*, 11 C. P. 430; *Hogan* v. *Morrisy*, 14 C. P. 441.

(*g*) 19 Gr. 229.

(*h*) 33 U. C. R. 499.

priority of their executions, while admitting that the whole of those payments must be accounted for (*i*) in a general distribution under the Act, if an administration be sought for in Chancery. He also holds that there is nothing in the statute disabling a creditor from prosecuting his claim to a judgment.

The difficulty of a personal representative's position under this Act was again illustrated in *Taylor* v. *Brodie* (*j*). There an executrix allowed judgment to be entered against her without raising any defence, and was held liable to the other creditors for the excess over the *pro rata* share received by the suing creditors. But Blake, V.-C., gave her an order over against the latter creditors for the excess. He lays it down as the duty of a personal representative on a deficiency of assets to put before the Court the true state of affairs, when such an order would have been made as would have relieved him and would have caused a distribution as contemplated by the Act.

In this case, as in *Donor* v. *Ross*, we get a hint as to the proper course under the statute of an executor of an insolvent estate when sued. It is to plead deficiency of assets to pay in full.

This would relieve the representative from the liabilities imposed by *Donor* v. *Ross* and *Taylor* v. *Brodie*. But the question is, would it be a complete defence to the action, as would be a plea of *plene administravit*, or (formerly) of specialty debts unpaid and no estate beyond, or would it be merely a suggestion, requiring the Court to take the administration into its own hands? If the latter, the estate is, in the High Court, taken out of the executor's hands and put to unnecessary expense, while in the County and Division Courts there is neither power nor machinery to do anything else than stay proceedings and compel the executor to apply to the High Court to administer.

In the two latter cases cited the plea is treated as a sufficient one, but in each, instead of stating that such a plea

(*i*) Apparently by the execution creditors, see *Donor* v. *Ross*, per Mowat, V.-C., at p. 282.

(*j*) 21 Gr. 607.

would be a good one in bar of the action, reference is made to an order of the Court being necessary to relieve the defendant entirely. In the earlier of these two cases the executor was not relieved even though an administration order had been made, and in the latter the sale of the goods took place after notice of motion for such an order. Indeed in *Parsons* v. *Gooding*, Wilson J., explicitly says that a creditor may sue to judgment subject to an accounting to the other creditors for any excess over his *pro rata* share. Apart from these authorities it would seem reasonable that a representative should be enabled to protect himself from being sued to judgment and the assets of the estate from being sold. The gist of the old plea of specialty debts and no assets beyond was that the assets in hand were reserved for debts of a higher order. Where now all debts are made equal is not the equity of every creditor to his exact share a higher right than that of the suing creditor? and should it not make all the debts a prior charge to any one of them until the fund is ascertained and capable of division? The letter of the old plea cannot of course be used, for no debt is now of a higher order than any other, but its spirit may be well worked out by considering the statutory right of equality as creating a higher and more prevailing class or order of creditors which overpowers the former right of one creditor to sue and administer *pro tanto* till his debt was paid.

This position is further fortified by considering the estate as a fund in which all creditors are interested, and out of which no one of them can be paid in priority to the rest. In *Chamberlin* v. *Clark* (*k*) Spragge, C.J.O., in affirming the right of a creditor to follow assets into the hands of those whose right was only secondary to his, states that it is his interest in those assets that enables him so to do, whether that interest be a lien upon them or not, and (at p. 279) he speaks of the assets as "the fund which ought to have been distributed rateably among the creditors."

Recent legislation points in the same direction. By the Devolution of Estates Act (*l*), all property is vested in the

(*k*) 1 Ont. R. 135; 9 App. R. 273.
(*l*) R. S. O. cap. 108, secs. 4 and 7.

personal representative, and subject to the payment of debts. The estate of a deceased person has now become by statute what Mr. Lewin calls "a species of trust property" (*m*). It is in a position under the section quoted not different from the assigned estate of an insolvent debtor under the Assignments and Preferences Act (*n*). The executor is a trustee; the testator's estate must be (to bring the section into operation) insolvent; it is (although not in words made so) protected from the consequences of judgments and executions, by the rights given executors to and creditors to have any deviation from the rule of equality rectified (*o*). In these particulars there is an exact correspondence. May not assets then be considered, when in the hands of an executor or administrator, as being "*in custodia legis* and available for the creditors in due course of law," and each creditor as potentially seised of his proper proportion of the assets (*p*).

A forcible analogy may be drawn from the principles first enunciated by the present Chancellor in *Dawson* v. *Moffatt* (*q*) and extended by the Divisional Court in that case. And Mr. Justice Proudfoot (at p. 488) in decreeing that simple contract creditors are by virtue of the Creditors Relief Act entitled to share in a fund either in the Sheriff's hands or in Court, uses language which is most apposite as applied to the difficulties arising under the old decisions cited in the preceding pages—"If there be any rule of the Court that would conflict with this right to equality established by statute, the rule must give way, whether it is founded on analogy to the former rule at law or on priority regulated by notice to trustees."

FRANK E. HODGINS.

(*m*) Lewin on Trusts, 8th ed., p. 224.

(*n*) R. S. O. cap. 124.

(*o*) See as to the right of an executor to an order against an overpaid creditor and of one creditor against another, *Taylor* v. *Brodie*, 21 Gr. 607, and *Chamberlain* v. *Clark*, 9 App. R. 273.

(*p*) See *per* Boyd, C., in *Wyld* v. *Clarkson*, 12 Ont. R. 592.

(*q*) 11 Ont. R. 484.

EDITORIAL REVIEW.

Retirement of Lord Justice Cotton.

Upon the retirement of Lord Justice Cotton the following remarkable eulogy which we take from the *Weekly Notes* was pronounced upon him by Lord Esher, M.R. Sir R. Webster, A.-G., replied on behalf of the Bar, in the same strain.

"The words which I am about to address to you are the considered words of every member of the Court of Appeal. They will thus have the greater weight. We have come into this Court, where Lord Justice Cotton so long presided, in order to make known to you all our deep sorrow at the greatest loss which could have happened to the Court of Appeal. Lord Justice Cotton has been obliged through ill-health to resign his high office, and his resignation has been accepted. His health broke down entirely from the strain put upon him by his assiduous, unswerving attention to his judicial duties. Lord Justice Cotton came to this Court straight from the Bar. He was the undisputed leader, in fact, of the Chancery Bar. We soon found that his knowledge of equity law was almost absolutely complete. Its principles, its practice, its details, its decisions, its application he had always ready. His powers of exposition and explanation were lucid in the highest degree. What invaluable assistance such powers gave to us, his colleagues, none of you can fail to appreciate. As a great lawyer, his predominant virtue was accuracy. As a Judge, his appreciation of law and facts was instantaneous, yet his theory, often pressed upon us, or some of us, always practised by himself, was that all

counsel should be heard to the fullest limit of what they desired to say, not only to the extent of the Court being certain that it had heard all that could reasonably be urged, but so that the parties might be satisfied that all had been said to the Court which they desired should be brought to its attention. As a great Judge, patience and justice were his predominant virtues. His knowledge, quickness, lucidity, and inexhaustible patience made him as great and just a Judge as has ever adorned the Bench. I must point out something more. He came into this Court when the joint administration of the two systems of law and equity was still unformed. Two sets of Judges of equal talent, equal independence, equal conviction, and equal pride were to be brought, if possible, without either side yielding to the other, to look at each of the systems with the same eyes. This could only really be brought about if each set, as to its own former system, would learn to regard it, not only as it had seemed to its practitioners before that it should be regarded, but also as it was regarded by the new minds now brought to bear more particularly upon it. The new point of view, the joint point of view, brought about by the fair contact of the two sets of minds, might be different from, but better than either of the former and narrower points of view. Two remarkable Equity Judges—Lord Justice James and the late Master of the Rolls—had approved and acted upon this view. From the moment that Lord Justice Cotton found that all the members of the Court of Appeal were intent, not upon encroachment, not upon the alteration of either law, but only on the discovery of a joint appreciation of each, he adopted that desire without reserve, assisted its attainment by his unrivalled skill, and has helped us almost, if not quite to realize it. In all ways we acknowledge with gratitude his superiority and his invaluable aid. We are here to testify our esteem and our affection, and, as I said at the beginning, our sorrowful sense that the Court of Appeal has suffered the greatest loss which could have happened to it."

Exhibits.

Exception has been taken to a passage respecting exhibits in an article on Inconsistencies of Practice which appeared in the November number of this journal. The remark is that exhibits in the Chancery Division are handed out "contrary to the rule." It is said not to be contrary to the rule to hand them out after judgment delivered without consent or order. The rule (685) is as follows:—"Where judgment is reserved, the exhibits used at the trial shall be deposited with the Registrar, Deputy Clerk, Deputy or Local Registrar for the use of the Court and shall not be delivered out without order or consent of parties." It is argued that as long as judgment is under reservation they can not be delivered out without consent or order, but after judgment, both by contrast to the prior part of the rule and by analogy to cases where judgment is not reserved, they can be delivered out without either. That does not seem to be the true construction, for the first part of the proposition is not true. While the case is under reservation, according to the suggested interpretation, either party can withdraw his exhibits with the consent of the other part. We deny that. They are deposited for the use of the Court, as the rule itself expresses it. And no consent of the parties would authorize a Registrar to hand out papers expressly left for the use of the Court. Therefore, the consent or order mentioned in the rule must refer to another period, viz., the period of the judgment. In other words, the rule when paraphrased means that, in a reserved case, the exhibits must be deposited for the use of the Court and shall not be handed out without consent or order.

BOOK REVIEWS.

The Bills of Exchange Act, 1890: being a codification of the Law Merchant respecting Bills of Exchange, Cheques, and Promissory Notes, with explanatory notes and illustrations from Canadian, English and American decisions. By THOMAS HODGINS, M.A., one of Her Majesty's Counsel. Toronto: Rowsell & Hutchison, 1890.

The timely appearance of this book will be of great assistance to those who desire to master the provisions of the recent Bills of Exchange Act. An introductory chapter upon negotiable paper prepares the student for the notes on the Act. With the experience of the working of the Act in England, of which this is almost a transcript, we have many useful authorities on the novel features of the legislation, while on the general features common to the old and new law, we have collected English, Canadian and American cases. Mr. Hodgins' well-known industry is a guarantee that everything, even remotely, bearing on the questions dealt with is placed before us.

Foreign and Domestic Law. A concise treatise on Private International Jurisprudence, based on the decisions in the English Courts. By JOHN ALDERSON FOOTE, of Lincoln's Inn, Barrister-at-Law; Chancellor's Legal Medallist, and Senior Whewell Scholar of International Law, Cambridge University, 1873; Senior Student in Jurisprudence and Roman Law at the Inns of Court Examination, Hilary Term, 1874. Second edition. London: Stevens & Haynes, 1890.

This work, like Westlake's, deals with private international jurisprudence as dispensed in British Courts of justice. The book, which has attained a recognized posi-

tion, is brought down to date by the insertion of all cases decided since the last edition, and the remodelling of such parts as required it.

English Constitutional History from the Teutonic conquest to the present time. By THOMAS PITT TASWELL-LANGMEAD, B.C.L., Oxon., Stanhope Prizeman in the University, 1866, Vinerian Scholar in the University, 1867, and late Professor of Constitutional Law and History, University College, London. Fourth edition. Revised throughout, with notes and appendices by C. H. E. CARMICHAEL, M.A., Oxon., Taylorian Scholar in the University, 1862, corresponding member of the Society of Comparative Legislation, Paris. London: Stevens & Haynes, 1890.

This book has become a standard university book, and to its ready reception in the colonial possessions, the the learned editor attributes its success. It is so well known that it needs no further notice.

The Law of Collateral Inheritance, Legacy and Succession Taxes, embracing the American and English decisions, with forms for New York State, and an appendix giving the statutes of New York, Pennsylvania and Connecticut. By BENJ. F. DOS PASSOS, Assistant-District Attorney N. Y. County, New York: L. K. Strouse & Co.

As we have not yet imposed upon ourselves legacy duty this book will not have great interest for us, except in an indirect way. As it professes to reduce the decisions to logical form it will no doubt find a comfortable and useful place where the taxes in question are dealt with as realities.

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THE

CANADIAN

LAW TIMES

NOTES OF CASES.

AND

INDEX-DIGEST FOR 1890.

Edited by

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OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[In Banc, 4th December, 1889.

REGINA v. SPAIN.

Summary conviction—Malicious Injuries to Property Act, R. S. C. c. 168, s. 59—Uncertainty—Nature of offence and property not particularly described.

A summary conviction under R. S. C. c. 168, s. 59, alleged, in the words of the statute, that the defendant unlawfully and maliciously committed damage, injury, and spoil to and upon the real and personal property of the Long Point Company.

Held, that this was not sufficient without its being alleged what the particular act was which was done by the defendant which constituted such damage, &c., and what the particular nature and quality of the property, real and personal, was in and upon which such damage, &c., was committed; and the conviction was quashed for uncertainty.

C. E. Barber, for the defendant.

Robb, for the complainant.

[The Divisional Court, 3rd December, 1889.

BLACKLEY v. DOOLEY.

Sale of goods—Payment by instalments—Property remaining in vendor—Transfer by vendor of his interest—Removal of goods by third party—Conversion—Trover—Detinue—Parties.

B. delivered to Mrs. M. a piano for which she agreed to pay $275, $50 down, and the balance by instalments; it was also

agreed between them that the piano should remain the property of B. until the payments were completed, and that upon any default in the payments B. should have the right to remove the piano. Default was made in these payments; the plaintiff purchased the notes representing them, and took from B. a transfer under seal of his property in the piano. Before the plaintiff acquired his interest, D., the agent for B. who had made the agreement with Mrs. M., and who was aware of B.'s rights, paid Mrs. M. $50, and was allowed by her to remove and did secretly remove the piano. D. had left B.'s employment at this time, and was acting adversely to him. This action was brought against D., Mrs. M., and her husband to recover the piano or its value with damages for its detention. It was not proved that any demand had been made upon D. for the return of the piano, It was objected by the defendant that neither detinue nor trover would lie.

Held, that the plaintiff was entitled to recover damages against D. for the conversion of the piano; for it was not necessary to impute the conversion to any particular period of time, and the defendant's denial after action of the plaintiff's right to the piano could be treated under the circumstances as evidence of a conversion before action by the defendant of the plaintiff's interest in it; and as against technical objections raised by a wrong-doer the benefit of all possible presumptions should be allowed.

Held, also, that it was not necessary that B. should be added as a party in order to entitle the plaintiff to succeed.

Furlong, for the plaintiff.

F. Fitzgerald, for the defendant.

[28TH NOVEMBER, 1889.

In re GEGG v. ADAMS.

Certiorari—Division Court plaints—Removal to High Court—Discovery.

The decision of FALCONBRIDGE, J., 9 Occ. N. 311, refusing an order to transfer three plaints from a Division Court to the High Court, was affirmed on appeal to a Divisional Court composed of ARMOUR, C.J., and STREET, J.; but it was imposed upon the plaintiff as a term in dismissing the appeal that he should undertake to submit to examination and make discovery of documents before the trial in the Division Court.

Kilmer, for the defendant.

J. Reeve, for the plaintiff.

[21st December, 1889.

PORT ROWAN & LAKE SHORE R. W. CO. v. SOUTH NORFOLK R. W. CO.

Costs—Security for—Action for the benefit of another—Non-existent corporation—Issue on pleadings.

An application for an order for security for costs was made on the ground that the plaintiffs had no corporate existence, and that their name was being used by one C., who was insolvent.

Held, upon the evidence that there was nothing to warrant the conclusion that this action was really brought for the benefit of any other than the plaintiffs.

Held, also, that the question whether the plaintiffs had or had not ceased to be an existing corporation, having been raised upon the pleadings, could not be raised and determined on an application for security for costs.

An order made in Chambers for security for costs was set aside.

Masten, for the plaintiffs,

W. M. Douglas, for the defendants.

CARTY v. CITY OF LONDON.

Costs—Taxation—Evidence taken de bene esse—Attendance of medical man on examination—Service of subpœnas by solicitor—Rules 254, 1212, 1217—Tariff A., items 16, 17.

1. An order was obtained by the plaintiff, who sued for damages for bodily injuries sustained, for his own examination *de bene esse* before the trial. The order provided that after the conclusion of the plaintiff's examination he should submit to a personal examination by medical men on behalf of the defendants, and that the defendants might afterwards continue their cross-examination of the plaintiff; and that the examination might be given in evidence at the trial "provided the defendants had been able to continue and complete their cross-examination of the plaintiff after the said medical examination." The plaintiff was examined and partly cross-examined under this order and was examined by the medical men, but his cross-examination was never completed. The plaintiff was not examined as

a witness at the trial; the depositions taken were offered in evidence, but were rejected as inadmissible under the terms of the order. The plaintiff succeeded in the action.

Held, under the circumstances of the case, that the examination of the plaintiff *de bene esse* was a proper and reasonable proceeding, and as the failure to complete it was through no fault of the plaintiff or his solicitor, and as it was not without use to the defendants, the costs of it should have been taxed to the plaintiff as part of the costs of the action.

Beaufort v. *Ashburnham*, 18 C. B. N. S. 598; 32 L. J. N. S. C. P. 97; 7 L. T. N. S. 710; 11 W. R. 267; 9 Jur. 822, followed.

2. The plaintiff's own physician attended on him during the examination *de bene esse*, and was called as a witness at the trial, when he stated what his charges for attendance on the plaintiff would amount to.

Held, that, there being nothing to shew that he did not include in his statement the charges for attendance at the examination, they must be taken to have been included in the verdict, and could not be taxed to the plaintiff as part of the costs of the action.

3. *Held*, ARMOUR, C.J., *dubitante*, having regard to Rules 254, 1212, 1217, and items 16 and 17 of Tariff A., that the plaintiff was not entitled to tax anything for costs of service by his solicitor of writs of subpœna.

Decision of GALT, C.J., 9 Occ. N. 457, varied.

G. W. Marsh, for the plaintiff.

Flock, for the defendants the London Street Railway Co.

Swabey, for the defendants the city of London.

TRUAX v. DIXON.

Costs—Scale of—Action by sub-contractors to enforce mechanics' lien—Amounts in question—Investigation of accounts—Jurisdiction of County Court and Division Court—R. S. O. c. 126, s. 28—Right of defendant land-owner to set-off of costs—Action tried without a jury—Powers of taxing officer—Amendment of judgment.

The plaintiffs, sub-contractors, in an action brought in the High Court to enforce a mechanic's lien claimed against the contractor $245.29 and recovered $284.54. They claimed a lien on the land for the amount due them, but upon the inves-

tigation of accounts to the extent of upwards of $1,700 between the contractor and the land-owner it was found that the latter owed only $63.79, and the plaintiffs' lien was limited to this amount.

Held, upon appeal from taxation of costs, that the contractor could not have sued the land-owner in the Division Court to recover the balance of $63.79, but must have proceeded in the County Court, and the plaintiffs, suing upon the same claim, were therefore entitled to County Court costs; and as the plaintiffs' claim was also beyond the jurisdiction of the Division Court, upon any construction of s. 28 of the Mechanics' Lien Act, R. S. O. c. 126, the plaintiffs could not have brought this action in the Division Court.

Held, also, that, as the plaintiffs could not have hoped to establish a case which would have entitled them to High Court costs, the defendant land-owner should be allowed a set-off of the excess of his costs incurred in the High Court over what he would have incurred in the County Court; but as the action was tried without a jury, and Rule 1172 did not apply, the taxing officer had no power to allow this set-off without the direction of the Court; and the judgment of the Court was amended so as to meet the case.

Aylesworth, for the plaintiffs.

D. W. Saunders, for the defendant George Dickson.

[BOYD, C., 3RD DECEMBER, 1889.

CHARD v. RAE.

Executors and administrators—Action upon a judgment—Grant of administration after action begun—Plaintiff not primarily entitled to administer—Right of widow to administer—Renunciation after action—Statute of Limitations, R. S. O. c. 60, s. 1—Parties—Joint judgment.

The rule in equity is that when a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character; but the same doctrine does not obtain where the person immediately entitled to obtain administration is not the one who begins the action.

Trice v. *Robinson*, 16 O. R. 433, distinguished.

Where the point is specially raised on the pleadings as to the time when the letters of administration were obtained, it devolves upon the Court to ascertain whether an action was begun in time by a properly constituted plaintiff.

The father of the plaintiff obtained judgment against L. and R. in an action upon a promissory note on the 26th October, 1868, and the plaintiff began this action against L. and R. upon the judgment on the 22nd October, 1888. At that time the plaintiff's father was dead and no personal representative of his estate had been appointed. On the 4th November, 1888, letters of administration to his father's estate were granted to the plaintiff, the widow renouncing probate on the same day. Subsequently to that the statement of claim was delivered and the action continued against R. alone. R. by his statement of defence put the plaintiff to the proof of his position and title to sue on the judgment, and set up, amongst other defences, the statute R. S. O. c. 60, s. 1.

Held, that, the widow was the person primarily entitled to administer, and as she had not renounced when the action was begun, the plaintiff had at that time no status; and as against the Statute of Limitations that no action was rightly begun within the period of twenty years fixed by the statute as that within which an action upon a bond or other specialty shall be commenced; and therefore the action failed.

Semble, also, that an objection raised at the trial that L. was not before the Court was a valid one; for an action on a joint judgment is not different in principle from an action of contract against joint contractors.

Dickson, Q.C., for the plaintiff.

Clute, for the defendant.

[7TH DECEMBER, 1889.

ROBINSON v. BOGLE.

Trade-name—"Belleville Business College"—Action to restrain use of designation—Non-appropriation of name by plaintiffs—Public user of name in relation to plaintiffs—Requisite that name should be specific and not merely descriptive—Costs.

The plaintiffs in this action sought to restrain the defendant from using the name "Belleville Business College" as the designa-

tion of a commercial school conducted by him in the city of Belleville. The plaintiffs had conducted a similar school in Belleville for about twenty years before the defendant began his, but "Belleville Business College" was not the registered name of the plaintiffs' establishment, nor did they themselves use that name in any way. Some people however had fallen into the way of speaking and writing of it as "Belleville Business College," it being for some time the only business college at Belleville; and after the defendant's advent, confusion arose in the post-office from letters addressed simply "Belleville Business College" arriving there; but it was not alleged or proved that any students were lost to the plaintiffs by reason of the defendant's conduct.

It was found as a fact that the name was never appropriated by the plaintiffs and that as used by other people it was merely indicative of the work done by the plaintiffs and the place where it was done.

Held, that public user of such a name in such a way, however widely diffused, could not attach the designation to the business so as to be equivalent to the proprietors' personal use of it; the title to such a name is based on priority of appropriation; and an actionable right could not exist in the plaintiffs unless the reputation had grown out of a visible connection by the plaintiffs themselves of the name with the business.

2. That there was nothing special or peculiar about the name entitling the plaintiffs to a monopoly by reason of its popular use in reference to them; in order to so entitle them the name should be something more than merely generic or descriptive; it should be specific or distinctive; and, in the absence of evidence of user of the name by the plaintiffs, or that the name of the locality was so inseparably connected with their establishment that a secondary meaning was to be attributed to it, there was no ground for protecting the name.

Thompson v. *Montgomery*, 41 Ch. D. 28, distinguished.

The action was dismissed; but no costs were given to the defendant because he had sought by the use of the name to gain advantage to himself in an unmeritorious way.

McCarthy, Q.C., *Burdett*, and *W. N. Ponton*, for the plaintiffs.

Clute and *J. J. B. Flint*, for the defendant.

[STREET, J., 12TH DECEMBER, 1889.

In re FERRIS AND EYRE.

Arbitration and award—Misconduct of arbitrators—Receiving ex parte statements—Affidavits on motion.

Upon a motion to set aside an award on the ground that the arbitrators improperly received statements from one of the parties in the absence of the other :—

Held, that it is not necessary in such a case to impute any intentional impropriety of conduct to the arbitrators, nor to shew that their decision has been in any way influenced by what has occurred; it is only necessary to shew that their minds may possibly have been influenced against the applicant by the communications that have taken place.

And where it appeared that after the close of the evidence, and while the arbitrators were considering it, some explanations in regard to an account were given to them by one party to the arbitration in the absence of the other on a certain evening, and that when the arbitrators and the parties all met the next morning, one of the arbitrators said that they had had an explanation about the account and wanted to know what the other party had to say about it :—

Held, that the award was bad, and must be set aside.

Upon the motion an affidavit tendered in reply was rejected because it contained only matter which supported the case made out by the original affidavits and depositions filed, and an affidavit in rejoinder was also rejected.

Moss, Q.C., for the applicants.

W. R. Meredith, Q.C., contra.

[20TH DECEMBER, 1889.

In re DAVIES AND COUNTY OF YORK.

Municipal by-law—Motion to quash—Notice of motion—Time—R. S. O. c. 184, s. 332—Rule 480.

This was an application by Robert Davies to quash by-law No. 548 of the municipal corporation of the county of York, incorporating the village of Chester.

The application came on to be heard before STREET, J., in Court on Friday the 20th December, 1889, the day for which

notice of motion had been given, but it was objected that the notice was too short.

The notice was served upon the clerk of the county on Saturday the 14th December, but after two in the afternoon.

J. K. Kerr, Q.C., and *C. Millar*, for the county of York, contended that service of the notice after two o'clock on Saturday was equivalent only to service on the following Monday, by Rule 480, and that service on the Monday would not be sufficient under s. 332 of the Municipal Act, R. S. O. c. 184, citing *Re Peck and Ameliasburgh*, 12 P. R. 664 ; *Re Colenutt and Colchester*, 9 Occ. N. 485 ; and *Re Sweetman and Gosfield*, *ib.* 486.

Ritchie, Q.C., for the applicants, in answer to the objection, submitted that the motion (if the notice was too short) should be retained before the Court, as in *Re Peck and Ameliasburgh*, the next Court day being within the time for moving against the by-law; and also argued that it was not too short, contending that Rule 480 does not apply to such a service as this, the initiatory step in the proceeding, adopting the argument advanced in *Re Cooke and Norwich*, 18 O. R. at pp. 75, 76.

STREET, J.—It appears to be doubtful whether Rule 480 applies; but, whether it applies or not, I think I should allow the notice of motion given to stand for the next Court day, Tuesday the 7th January, 1890. Costs of the day to be paid by the applicant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 8TH OCTOBER, 1889.

BROWN v. GROVE.

Fraudulent conveyance—Assignment for the benefit of creditors—Sheriff as assignee—Death of sheriff—Deputy and successor as assignees—Refusal to act—R. S. O. c. 124.

In an action by a judgment creditor to set aside a conveyance made and the proceedings had under a power of sale in a mortgage (by which certain property was transferred) as in fraud of creditors :—

Held, affirming ARMOUR, C.J., that upon the evidence the plaintiff could not succeed.

Held, also, that the plaintiffs had no *locus standi* because an assignment for the benefit of creditors had been made by the owner of the property to the sheriff, and although the sheriff

was dead and nothing had been done under the assignment since, the individual creditors could not sue without first getting rid of it; that by R. S. O. c. 124 assignments for the benefit of creditors made to a sheriff are made to him as a public functionary, and on his death the administration and care of the assigned estate devolves upon his deputy and thereafter upon his successor in office.

It is not competent to the sheriff as a public officer to disclaim or decline to act as assignee. He has no such option as might exist in the case of a private assignee.

W. Nesbitt and *Lees*, for the plaintiffs.

Lash, Q.C., for the defendants.

FRANK v. TOWNSHIP OF HARWICH.

Right of way—Road along lake shore—User and dedication—Cul de sac road ending at navigable water.

Uninterrupted user of a roadway along the edge of an unoccupied and unenclosed farm bordering on a lake, upon the bed of sand formed there by the waters of the lake, for a sufficient length of time, will give a right of way; and the building of two piers across the same on the sides of a passage made by the breaking through of a small inland lake will not affect the right of way, as the roadway terminates at the channel made by the piers on navigable water, which is itself a natural highway.

The Queen v. *The Inhabitants of East Mark*, 11 Q. B. at p. 882, quoted.

Judgment of FALCONBRIDGE, J., affirmed.

Moss, Q. C., and *Macbeth*, for the plaintiff.

Matthew Wilson, for the defendants.

[19TH OCTOBER, 1889.

LE MAY v. CANADIAN PACIFIC RAILWAY CO.

Railways and railway companies—Master and servant—51 V. c. 29 (D.), s.-s. 262, 289—"Persons injured thereby"—Answers of jury—Negligence—Volenti non fit injuria.

The plaintiff was a switch foreman in the employ of the defendants, and in uncoupling cars got his foot caught in an unpacked frog and crushed by a car. In this action it was con-

tended that the plaintiff, being an employee of the company, was not within the meaning of 51 V. c. 29 (D.), ss. 262 and 289. The jury were asked: "Did the plaintiff before the happening of the accident have notice or knowledge, or ought he to have had notice or knowledge, that the frog was not packed?" and the answer was: "We believe he did not have notice, and should have had notice." They were also asked: "Was the plaintiff guilty of contributory negligence?" Answer: "We do not believe that he was."

Held, affirming FALCONBRIDGE, J., that the plaintiff came within the definition, "Any person injured thereby" in s. 289, and that to leave track and switchmen out of the benefit of the Act would be to minimize its scope and violate one of the main canons of interpretation laid down by the Legislature whereby all Acts are remedial and to be liberally construed: R. S. C. c. 1, s. 7, s-s. 56.

Held, also, that, even if the answer to the first question was to be taken to mean that the plaintiff should have himself known that the frog was not packed, instead of the more obvious meaning that the company did not notify him as they should have done; that would not prevent him recovering so long as he was not himself negligent, as found by the other answer.

Thomas v. *Quartermaine*, 18 Q. B. D. at p. 697, referred to.

Held, also, that there was no evidence which would warrant such a finding as is defined by Wills, J. in *Osborne* v. *London and South Western Railway Company*, 21 Q. B. D. at p. 224, as that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it, and that the maxim *volenti non fit injuria* did not apply.

Shepley, for the defendants.

Delamere and *F. H. Keefer*, for the plaintiff.

ANDERSON v. SAUGEEN MUTUAL FIRE INS. CO. OF MOUNT FOREST.

Insurance—Fire—Time within which proofs of loss to be made and action commenced—Mortgage clause—Default of mortgagor—Subrogation—Premium note—R. S. O. c. 167, s. 131.

W. insured his mill with the defendants for $1,000. At the time of the insurance the mill was mortgaged to P. The defendants gave a policy payable on its face to the extent of $500

to P., as mortgagee or as his interest should appear. The mortgage clause was on a separate slip attached to the policy. A fire took place on the 10th October, 1887, and proofs of loss were made by W. on the 28th September, 1888, and by P. for himself on the 20th September, 1888. An action by W. and the executors of P. against the company was begun on the 8th October, 1888.

Held, affirming BOYD, C., that the mortgagee was not bound as "the assured" under statutory condition 12 to make proofs of loss, and that the person assured is the person to make them under conditions 12 and 18.

Held, also, that the neglect of the assured to make the proofs of loss in proper time, so that the sixty days thereafter might expire before the termination of the year after the loss within which an action could be brought under condition 22, was a neglect, from the consequences of which the mortgagee was relieved by the mortgage clause, and that as far as he was concerned the action was not brought too soon.

Held, also, that the words "*shall claim* that as to the mortgagor no liability exists" in the mortgage clause mean, "and as to the mortgagor no liability exists;" and that as the policy was valid at the time of the fire, and nothing was shown to have taken place since to render it invalid, there was a liability to the mortgagor; that condition 22 barred the remedy and not the right; and that the defendants were not entitled to subrogation.

Held, also, that the mortgagor was bound to make the proofs in such time that the sixty days would elapse before the expiration of the year limited for bringing the action and his remedy as to the other $500 of the policy.

Held, also, that as against the mortgagee the directors of the company were not entitled to retain the amount of the premium note under R. S. O. c. 167, s. 131; if it was paid they had no claim; and if not paid it was the default of the mortgagor from the effects of which the mortgagee was protected by the mortgage clause.

Lash, Q.C., for the plaintiffs.

Wm. Kingston, for the defendants.

[BOYD, C., 30TH NOVEMBER, 1889.

TRADERS' BANK v. BROWN MANUFACTURING CO.

Lien—Hire receipt—Default—Presumption of possession—Right to enter on premises.

Where one sold machinery to another upon the terms expressed in a hire receipt that "the title of and right to the possession of the above mentioned property, wherever it may be, shall remain vested in the said vendor and subject to his order until paid for in full:"

Held, that the vendor or his assigns had the legal right, the purchase money being in arrear and unpaid, to enter upon the premises in order to resume actual possession of the machinery, giving notice and using all care in so doing, but that it would be illegal for him to take possession by force; and an injunction might properly issue to restrain acts of force on the part of the vendor, but only on the terms that the vendee be likewise enjoined from using force to interfere with the rights of the vendor, but the vendor should first give such security as is usual in replevin before taking possession of the machinery.

Lash, Q.C., and *Lefroy*, for the plaintiffs.

Hoyles, for the defendants.

[5TH DECEMBER, 1889.

TOWNSLEY v. BALDWIN.

Mechanics' lien—Action by sub-contractor—Demurrer—Necessity of averment that something is due to the contractor.

Demurrer to the statement of claim in an action by a sub-contractor to enforce a mechanic's lien, upon the ground that there was no averment that anything was due from the land-owner to the contractor.

Held, that the demurrer should be allowed, for if no amount is owing by the owner to the contractor there is no lien in favour of the sub-contractor.

Snelling, for the plaintiff.

J. F. Edgar, for the defendant Adams.

[6TH DECEMBER, 1889.

In re J. T. SMITH'S TRUSTS.

Money in Court—Application to pay out to trustees—Trustee company—Party entitled to income—Retention in Court—Remainderman.

On an application by a trustee company and a person who was entitled for life to the income of a fund in Court, which was the proceeds of the sale of certain settled estates, for the payment out of the fund for the purpose of investment by the company as trustees, they having been appointed trustees under the will which devised the settled estates, which application was opposed by the official guardian on behalf of the remainderman: —

Held, that the practice and current of authority were against what was asked by the petitioners, and that they were not entitled to it as a matter of right, and that the application must be dismissed.

Arnoldi, for the petitioners.

J. Hoskin, Q.C., for the remainderman.

[18TH DECEMBER, 1889.

In re McCAULEY AND CITY OF TORONTO.

Good-will—Element in determining compensation for lands expropriated.

This was an appeal by John McCauley from an award of arbitrators fixing compensation for lands expropriated by the municipal corporation of the city of Toronto for the purposes of a drill-shed. The appellant asked to have the award referred back to the arbitrators to estimate the damage to the appellant from the loss of the good-will of the business carried on by him for twelve years upon the premises taken—the whole of the appellant's land having been taken.

Lash, Q.C., for the appellant.

C. R. W. Biggar and *Worrell*, for the city of Toronto.

BOYD, C.—Where land is not compulsorily taken but only injuriously affected, the injury resulting from diminution of good-will pertaining to business carried on upon the premises is not an element of compensation. But where the land itself upon which the trade is carried on is expropriated * * * damage to the good-will may be a proper subject of compensation. * * *

Here the whole of the appellant's land on which he has been conducting his business for some twelve years has been taken. The evidence tendered as to loss sustained by injury to his good-will was admissible, and its effect should have been considered by the arbitrators. For this purpose the award will be remitted back to them.

Rickett's Case, L. R. 2 H. L. 175; *White* v. *Commissioners of Works*, 22 L. T. N. S. 591; *Senior* v. *Metropolitan Railway Co.*, 2 H. & C. at p. 266; *Cameron* v. *Charing Crossing Co.*, 16 C. B. N. S. 430; *Chamberlain* v. *West End of London Railway Co.*, 2 B. & S. 605, 617; *Caledonian Railway Co.* v. *Walker*, 7 App. Cas. 259, were referred to.

[19TH DECEMBER, 1889.

ROUTLEY v. HARRIS.

Slander—Charging offence punishable by imprisonment—Crime—Malicious injury to property—R. S. C. c. 168, ss. 26, 27, 58, 59.

Held, upon demurrer to a statement of claim, that any defamatory charge referable to wrong-doing under the 26th and 58th sections of the Act relating to Malicious Injuries to Property, R. S. C. c. 168, would be actionable without special damage, inasmuch as those sections impose the penalty of imprisonment for the offences therein provided for; but that if such defamation imputed wrong-doing under the 27th or 59th sections of that Act, special damage must be alleged, inasmuch as those sections merely impose a fine upon persons liable under them.

Aylesworth, for the demurrer.

Folinsbee, contra.

[20TH DECEMBER, 1889.

FOUCHIER v. ST. LOUIS.

Costs—Contribution between parties liable for—Reference, scope of—Costs of appeal from Master's report.

In an action by creditors to set aside a conveyance of land as fraudulent a consent judgment was pronounced which was so framed as to exclude creditors other than the plaintiffs from sharing in the proceeds of the property. Upon the petition of a creditor this judgment was opened up, the conveyance was declared fraudulent and void against all creditors, and a reference

was directed to a Master to sell the lands and distribute the proceeds of sale among the creditors and incumbrancers. It was also ordered that the petitioner's costs should be paid by the plaintiffs and the two defendants. The Master made a special finding in his report that the whole of the petitioner's costs had been paid by the defendant St. L. The latter appealed from the report on the ground that the plaintiffs should have been found liable to contribution in respect of these costs, and also moved substantively for an order for payment of one-third thereof by the plaintiffs.

Held, that the Master was right under the terms of the reference not to deal with the question of contribution; but that the defendant St. L. was entitled to a substantive order against the plaintiffs for payment of one-third of the costs, because the plaintiffs were jointly liable with him and the other defendant therefor.

As there was no need to appeal and the application might have been made in Chambers, no costs of it were given.

J. A. MacIntosh, for the plaintiffs.

D. W. Saunders, for the defendant St. Louis.

COMMON PLEAS DIVISION.

[In Banc, 21st December, 1889.

REGINA v. RICHARDSON.

Motion—Renewal of, where refused—Indulgence—Merits.

It is only by the indulgence of the Court that a second application is permitted or entertained, where the first application has been refused.

And where the defendants' applications for orders *nisi* to quash convictions were refused upon the ground of non-compliance with the statute and Rule requiring a recognizance and affidavit of justification to be filed, and the Court upon such applications was not favourably impressed by what was urged as the merits of the applications:—

Held, that the indulgence of the Court ought not to be extended in favour of fresh applications made by the defendants upon new material supplying the defects.

DuVernet, for the defendants.

[THE DIVISIONAL COURT, 21ST DECEMBER, 1889.

REGINA v. ARMSTRONG.

Costs—Appeal to Divisional Court from Judge in Chambers—Neglect to set down.

The defendant served upon the convicting magistrates notice of a motion by way of appeal from an order of a Judge in Chambers refusing a *certiorari* to remove his conviction, returnable before a Divisional Court on the first of the Michaelmas sittings, but did not set the motion down for hearing before the sittings, or take any step after serving the notice of motion to bring it to a hearing during the sittings.

The Court ordered the defendant to pay to the magistrates their costs of appearing to shew cause against the motion.

Langton, for the magistrates.

[26TH DECEMBER, 1889.

CANADA COTTON CO. v. PARMALEE.

Attachment of debts—Rule 935—Unadjusted insurance moneys—Locus standi of garnishees—Appeal—Garnishees out of Ontario.

Held, reversing the decision of FALCONBRIDGE, J., 18 P. R. 26, that moneys due or owing from an insurance company to a policy holder are garnishable under the enlarged provisions of Rule 935.

Webb v. *Stenton*, 11 Q. B. D. 518, and *Stuart* v. *Grough*, 15 A. R. 299, considered.

Held, also, affirming FALCONBRIDGE, J., that the garnishees had the right to appeal against an order directing the trial of an issue between the judgment creditors and a claimant of the moneys attached.

Held, lastly, that the garnishees, being a foreign corporation, were not "within Ontario," and therefore not subject to the provisions of Rule 935.

D. W. Saunders, for the plaintiffs.

Aylesworth, for the garnishees.

[STREET, J., 17TH DECEMBER, 1889.

McNIDER v. ROSS.

Ejectment—Action by mortgagee—Speedy judgment—Rule 744.

In an action of ejectment brought by a mortgagee upon default of payment of the mortgage, an application was made immedi-

ately after the issue and service of the writ of summons under Rule 744 for leave to enter immediate judgment, the reason being that the plaintiff had an advantageous offer for purchase of the lands, and wished to be in a position to give the purchaser possession.

Notice was served upon the defendant, but he did not appear upon the motion.

STREET, J., granted the order.

Hoyles, for the plaintiff.

[23RD DECEMBER, 1889.

In re SWEETMAN AND TOWNSHIP OF GOSFIELD.

Municipal drainage by-law—Motion to quash—R. S. O. c. 184, ss. 571, 572, construction of—Time—Service of notice of motion and filing affidavits.

A municipal drainage by-law was passed on the 1st November, 1889, and on the 12th December, 1889, notice of a motion to the Court for an order quashing it was served upon the municipal corporation, and affidavits in support of the motion were filed. The notice was for Friday the 20th December.

Held, that the meaning of s. 572 of R. S. O. c. 184 is that in case the application to quash is not made within the six weeks prescribed by s. 571, the by-law shall be valid; and that the service of the notice and the filing of the affidavits within the six weeks was a sufficient making of the application.

Langton, for the applicant.

W. H. Blake, for the township.

(See also the same case, 9 Occ. N. 486.)

IN CHAMBERS.

[BOYD, C., 16TH DECEMBER, 1889.

MALONE v. DAVIES.

Costs—Taxation—Motion for receiver after judgment—Petition or notice of motion—"Attending to give admission of service"—"Instructions for brief"—Solicitor acting in person.

The defendant appealed from the taxation by a local officer at Hamilton of the plaintiff's costs of an application after judgment in this action, for the appointment of a receiver of the share of

the defendant in the estate her deceased husband, in which her infant children were also interested, and for equitable execution.

Hoyles, for the appeal.

Kappele, for the plaintiff.

BOYD, C., held: (1) That the application might have been upon notice of motion instead of upon petition, referring to Rule 525, but that under the peculiar circumstances of this case the plaintiff was entitled to tax the costs of the petition be had filed; (2) That the item "attending to give admission of service of affidavits" could not be allowed; (3) That "instructions for brief" could not be allowed where the plaintiff, a solicitor of the Court, was acting on his own behalf.

[17TH DECEMBER, 1889.

In re BEATY AND CITY OF TORONTO.

Costs—Arbitration and award—Expropriation of lands by municipal corporation—Award of costs "as between solicitor and client"—R. S. O. c. 184, s. 399—Error on face of award—Taxation of costs.

Section 399 of the Municipal Act, R. S. O. c. 184, provides with regard to arbitrations under the Act, that the arbitrators shall have power to award the payment by any of the parties to the other of the costs of the arbitration, and may either direct the payment of a fixed sum or that the costs shall be taxed on either the scale of the High Court, or of the County Courts, in which case the costs shall be taxed by the officer of the proper Court.

Arbitrators directed that the costs of certain land-owners of arbitration proceedings to ascertain the compensation to be paid by a municipality for land expropriated should be taxed on the scale of the High Court "as between solicitor and client."

Held, that the judicial discretion of the arbitrators was exercised and expended when costs were adjudged according to a certain scale; and that the arbitrators had no power to give costs "as between solicitor and client"; and, as the error appeared on the face of the award, the municipality was not driven to appeal therefrom, but was entitled to claim the benefit of the excess of jurisdiction upon the taxation of the costs.

The ruling of the taxing officer that the costs should be taxed as between party and party was affirmed.

W. N. Miller, Q.C., and *T. W. Howard*, for the land-owners.

C. R. W. Biggar, for the city of Toronto.

[MacMahon, J., 3rd and 12th December, 1889.

KINGSLEY v. DUNN.

Judgment under Rule 739—Affidavit of defendant—Cross-examination of plaintiff—No discretion to refuse—Costs.

Upon a motion for judgment under Rule 739 the defendant may satisfy the Judge that there is a good defence otherwise than by affidavit; and one means of doing so is by cross-examination of the plaintiff on his affidavit filed in support of the motion.

And where the defendant was sued as administratrix of her late husband upon a promissory note made by him, and upon a motion by the plaintiff for judgment under Rule 739 filed an affidavit in which she did not set up any defence;

Held, nevertheless, that there was no discretion to refuse her an opportunity of cross-examining the plaintiff; and upon an appeal from the decision of a local Judge refusing an enlargement for such purpose, and allowing the plaintiff to sign judgment, a direction was given that the plaintiff attend at his own expense for cross-examination, and although upon such cross-examination the defendant could not shew that she had any defence, and the order for judgment was affirmed, she was allowed a portion of the costs of a successful appeal.

H. Cassels, for the plaintiff.

W. M. Douglas, for the defendant.

[Street, J., 14th December, 1889.

SPELLMAN v. SPELLMAN.

Habeas corpus ad testificandum—Civil action—Witnesses serving sentences of imprisonment.

This was an action for alimony, and was on the docket for trial at the Toronto Autumn Chancery Sittings, 1889. The defendant and his brother were at the time of the sittings serving sentences for felony in the Kingston Penitentiary.

The defendant moved for an order for the issue of a writ of *habeas corpus ad testificandum* to bring up himself and his brother to Toronto, swearing that they were both necessary witnesses for the defence.

Nicholas Murphy, for the defendant, referred to Rule 582 and to *Re Price*, 4 East 587, and stated that he did not think there was any statutory authority for the motion in a civil action, but contended that the order asked for was within the inherent powers of the Court. He also urged that the prisoners should be brought up from Kingston at the expense of the Crown.

Notice of the motion was served upon the Minister of Justice for the Dominion, who did not however appear.

Tytler, for the plaintiff, did not object to the order.

STREET, J., made the order as asked, upon payment by the defendant of all the expense of bringing the prisoners to Toronto.

[14TH DECEMBER, 1889.

In re SOLICITOR.

Solicitor and client—Bills of costs rendered to executors for services to estate —Residuary legatees may apply for taxation—R. S. O. c. 147, ss. 32, 42 —Place of reference—Agency work done in Toronto—Discretion—Special circumstances—Amount of bills—Retaining fees.

Residuary legatees may apply for taxation of bills of costs rendered to executors for services to the estate; for they come within s. 42 of the Solicitors' Act, R. S. O. c. 147, as being "liable to pay," *i.e.*, by the lessening of the amount of the residuary estate.

Where the proceedings in respect of which bills of costs were rendered were carried on principally at Belleville, but the bills were made up in part of charges for agency work done at Toronto:—

Held, that there was a discretion under s. 32 of the Solicitors' Act, R. S. O. c. 147, to refer the bill to a taxing officer at Toronto instead of at Belleville; but that discretion should not be exercised in favour of Toronto in every case where agency work is done there, and should not be exercised unless under special circumstances.

And in this case the large amounts of the bills and the fact that retaining fees were charged by the solicitor were looked upon as special circumstances.

Middleton, for the applicants.

C. J. Holman, for the solicitor.

[26TH DECEMBER, 1889.

In re RYAN v. SIMONTON.

Evidence—Ex parte certificate of County Judge.

No certificate by a judicial officer of proceedings had before him can properly be settled where it is intended to be used as evidence, unless in the presence of, or at least on notice to, all the parties concerned.

Aylesworth, for the plaintiff.

W. M. Douglas, for the defendant.

[19TH DECEMBER, 1889.

ST. LOUIS v. O'CALLAGHAN.

Writ of summons—Renewal of after expiry—Powers of local Judge—Certificate of lis pendens—Issue of before action—Adding parties—Statement of claim—Amendment.

Where a certificate of *lis pendens* purporting to be issued in this action was by an error of an officer of the Court issued before the action was begun, an order was made in the action so declaring and directing that it be set aside on that ground.

Held, also, that a local Judge has jurisdiction by the combined effect of Rules 238 and 485 to make an order for the renewal of a writ of summons even at a time when such writ has actually expired.

Re Jones, Fyre v. *Cox*, 46 L. J. N. S. Ch. 816, followed.

And where a local Judge in 1887 and again in 1889 made orders renewing a writ of summons issued in 1886, and such orders were not appealed against:

Held, that the writ must be treated as having been properly renewed by such orders.

But where a new defendant was added in 1889 to an action begun in 1886:

Held, that the statement of claim should shew on its face the date at which such defendant was made a party, and an amendment was ordered.

Hoyles, for the defendant Hyland.

W. H. P. Clement, for the plaintiff.

[THE MASTER IN CHAMBERS, 18TH NOVEMBER, 1889.

FINN v. MILLER.

RATHBONE v. MILLER.

Mechanics' liens—Annulling registration.

Mortgagees had advanced most of their mortgage moneys to the mortgagor, for the purpose of paying off a prior mortgage and for improvements on the premises, when F. filed his lien for work done and materials provided, and within ninety days began action, not making the mortgagees parties. R. also took like proceedings to enforce a lien, and made the mortgagees parties, but did not serve them.

The mortgagees, under power of sale, notified F. and R. and other registered lien holders, and sold the premises.

On motion of the mortgagees, an order was made annulling the registry of all the liens and certificates of *lis pendens*, the mortgagees being ordered to pay such balance of the proceeds of the premises into Court, under the Act respecting the Law and Transfer of Property, as should be in their hands after satisfying the mortgage claim and costs

Messrs. J. and W. Maclaren held a mortgage for $6,000, registered 23rd October, 1888, on lands of A. C. Miller, and had advanced for purposes of the loan all but a small portion of the mortgage money when notified on 3rd February, 1889, of the filing of a lien by James Finn, who registered his certificate of *lis pendens* on 9th March, 1889. Rathbone also filed a lien on 15th February, 1889, and *lis pendens* on 13th April, 1889, making the mortgagees parties, but not serving them. They were not parties to Finn's action. Liens were also filed by other mechanics and material men against Miller and the premises in question.

Messrs. Maclaren, when default was made in payment of interest on this mortgage, gave notice under their power of sale to the mortgagor and all the lien-holders, and on the 2nd of October, 1889, sold the property at auction for a sum in excess of the mortgage debt.

They now applied, shewing these facts, and that the purchaser required the liens and registration of the two certificates of *lis pendens* to be removed as clouds on the title, to have the registry annulled.

J. C. Hamilton, for the mortgagees. The applicants should not have been made parties to the lien suits: *McVean* v. *Tiffin*, 13 A. R. 1, and *Reinhart* v. *Shutt*, 15 O. R. 325. The liens, being registered after the mortgage, are subject to its provisions, and the power of sale having been duly exercised after notice, the

holders of liens can now have no right to interfere with the land, but at most to stand in the mortgagor's position as to any surplus. The Court has authority so to delare and annul the registrations, under s. 30, s-s. 8, of the Mechanics' Lien Act.

R. Gilray, for Finn; *J. H. Reeves*, for Rathbone; and *W. H. Irving*, for Watson, another lien-holder, objected.

D. Fasken, for a subsequent mortgagee, claimed that the balance should be paid to him.

THE MASTER IN CHAMBERS.—The order should go as asked; the 30th section of the Act meets the case; the purchaser under the power of sale in this mortgage should not have any cloud upon his title, but the lien holders and all others who may claim the surplus should have opportunity to advance their claims upon it. Order therefore to go annulling all registrations of liens subsequent to the applicants' mortgage, but they to pay into Court in the usual manner under the 15th section of c. 100, R. S. O., any balance in their hands after satisfying principal, interest, and costs.

NEW BRUNSWICK.

In the Supreme Court.

[20TH DECEMBER, 1889.

Ex parte BROOKS.

Assessment and taxes - Assessment of real estate—Duties of assessors—Application to be assessed—Sworn statement must be accepted by assessors—Penalty for refusing to assess—Mandamus—Costs—C. S. c. 100.

This was a motion for a mandamus to compel the assessors of rates for the parish of G., Queen's Co., to revise and amend the assessment roll of 1889, and the assessment delivered to the collector of rates, by inserting the applicant's name thereon and to assess him. Within the time prescribed by the assessors the applicant made and caused to be delivered to the assessors a sworn statement in writing, as authorized by statute, in form B., C. S. c. 100. This statement set forth that he resided in the parish of G., Queen's Co., and that he owned a freehold lot of land, the estimated current and saleable value of which was $150, that he

was possessed of no personal property, and his income was nothing. He requested the assessors to tax him and place his name on the assessment list. He was not requested or required by the assessors to answer under oath or otherwise any further questions as to the nature or amount of the property. At the time of the delivery of this sworn statement to the assessors he was the owner of the property mentioned. One of the assessors demanded that the applicant be assessed, but the other two refused to assess him on the ground that the sworn statement did not set out whether the real estate was in the parish of G. or not, and gave no description of it.

The judgment of the Court was delivered by

TUCK, J.—In refusing B.'s application to assess him and place his name on the list, the majority of assessors acted directly contrary to C. S. c. 100. The statement handed in by B. was precisely in the form given by the statute, which does not require the applicant to state where his property is situate. To entitle a person to be assessed on real estate it is not necessary that he should have a title or deed on record; it is sufficient if he has real estate in the parish where he claims to be assessed. This is properly the state of the law; for a man may have the right to be assessed as the heir or devisee to real property, and such a title may not appear by the records. A majority of the assessors undertook to determine arbitrarily that B. ought not to be assessed, and this not from ignorance of the law, but in defiance of it.

Ordered that the rule be made absolute, with costs to be paid by the two assessors who refused to accept the applicant's sworn statement.

L. A. Currey, for the applicant.

Blair, A.-G., and *J. D. Neales*, contra.

Ex parte CASE.

Assessment and taxes—Assessment of personal property—Mandamus to compel assessors to put names on list—Costs—C. S. c. 100.

This was an application for a mandamus to compel the assessors of rates for the parish of G., Queen's Co., to revise and amend the assessment for 1889 by inserting the applicant's name thereon and assessing him, differing only from *Ex parte Brooks* (*supra*)

in that it was for personal property instead of real estate. The applicant handed the assessors a sworn statement in writing, which set forth that he owned personal property, the estimated current and saleable value of which was $400, and requesting the assessors to tax his property and place his name on the list.

The judgment of the Court was delivered by

TUCK, J.—From the affidavits, which were not contradicted, produced on the part of the applicant, it is clear that he delivered to the assessors a statement in writing upon oath of the property or income assessable against him, in the form prescribed by C. S. c. 100. S. 56 enacts: "If any person makes the above statement upon oath, and answers under oath any further question that the assessors may think necessary as to the nature and amount of his property or income, such statements and answers shall be conclusive upon the assessors as to all matters of fact sworn to, except as to the value of real estate or of specific personal property which may be described, and such value shall be fixed by the assessors at the like amount at which similar property is valued." I think that this section is in accord with s. 53 of the same chapter, and in no way is in conflict with it. The latter section refers to a statement made by a person not under oath, and in such cases the assessors, notwithstanding the statement, may, under the provisions of that section, assess such person for such amount of real or personal property or income as they believe to be just and correct, or they may omit him. But if he makes the statement under oath they have no such power. Here the statement was made in writing under oath, and the assessors did not put nor did they seek to put to him any further question as to the nature or amount of his personal property, but, contrary to the Act, refused to place his name on the assessment roll, on the ground, as a majority of their number say, that he was a non-resident of the parish. I think that the affidavits warrant the conclusion that the majority did this wilfully in order to prevent the applicant voting at the municipal or other elections in Queen's County.

Ordered that the rule for mandamus be made absolute with costs to be paid by the two assessors who refused to accept the applicant's sworn statement.

L. A. Currey, for the applicant.

Blair, A.-G., and *J. D. Neales*, contra.

[PALMER, J., 24TH DECEMBER, 1889.

DOWD v. DOWD.

Pleading—Equity—Cross-interrogatories—Time to take exceptions.

Held, that under C. S. c. 37 and 45 V. c. 8, the cause could be set down for hearing before the expiration of two months after the filing of the cross-interrogatories.

Davis v. *Davis*, 9 Occ. N. 259, overruled.

W. W. Allen, for the plaintiffs.

J. Roy Campbell, for the defendants.

IN CHAMBERS.

[PALMER, J., 27TH DECEMBER, 1889.

REGINA v. CARLETON.

Medical practitioner—Medical Act, 1881—Conviction for practising physic without registration—Clairvoyants not within the provisions of the Act—Conviction quashed—Costs.

This was a review of a conviction under the Medical Act of 1881 for unlawfully practising physic for gain. Section 29 of that Act is as follows: "If any person not registered or licensed under this Act, or not being actually employed as a physician or surgeon in Her Majesty's naval or military services, practises physic, surgery, or midwifery for hire, gain, or hope of reward, he shall thereby forfeit the sum of twenty dollars for each day he so practises."

The facts of this case were that the prosecutor, who was a member of the Medical Society, according to his own account, went to the defendant's office and pretended to want medical assistance, which he did not, for the purpose of entrapping and inducing the defendant to break the law as he supposed by treating him as a physician, the object being to convict the defendant of the offence and thus prevent the defendant, whom he considered a quack, from practising.

PALMER, J.— It was not denied that defendant was a clairvoyant physician practising in the Province at the time of the passing of the Act, the 41st section of which contains the following provision: "Provided nevertheless that this Act shall not apply to or be construed to extend to clairvoyant physicians practising

at the present time in this Province or to midwives." But the prosecutor contends that the magistrate decided in the case that what the defendant did in this case was not practising as a clairvoyant physician, but as an ordinary physician, and therefore he thought that he was liable to the penalty provided by the Act; but it appears to me this is wrong. The Act does not deal with what a physician should or should not do, but the object of the Act is to have persons who are qualified and authorized to practise as physicians registered, and does not allow any other persons so to practise. It does not profess to regulate how the persons so registered or persons who may not be governed or come within the purview of the Act at all shall practise, and therefore it appears to me that when the Act in the plainest terms says it shall not apply to any person or particular class of persons, it would be doing a violence to the Act and going in the teeth of its express provisions to decide that the Act did not apply to this defendant and that he was liable to the penalties mentioned in it.

I therefore think that this conviction is entirely without warrant and should be set aside, and the law compels me to give the defendant costs.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

REGINA v. BURKE.

Extradition—Identity of charge—Foreign depositions—Condensed depositions—Evidence for extradition—Accessories—Statute passed after Extradition Act.

The information upon which the original warrant for the arrest of the prisoner issued was sworn on the 20th June; it was afterwards amended and re-sworn on the 2nd July. The prisoner in fact came before the extradition Judge on the 26th day of June. The caption of the evidence given before the Judge stated that it was taken in the presence of the prisoner, "Who is charged on the 26th day of June, 1889, and this day before me,

etc." The charge in the information and the caption of the evidence were identical.

Held, that the evidence so taken could be read in support of the information.

Foreign depositions may be read although not taken in the presence of the prisoner.

Depositions were taken by a stenographer before a grand jury in a foreign country. From these a shorter statement was made by an attorney, who swore that he omitted nothing material. The witnesses were then, with this shorter statement, sent back to the grand jury. When tendered in evidence here the depositions appeared to be properly certified as having been signed and sworn to by the witnesses.

Held, that such depositions were admissible.

Foreign depositions, more in the form of affidavits than depositions, may be admissible in evidence here.

The evidence necessary for extradition must be as strong as (in the case of a domestic offence) that necessary for committal for trial.

Upon appeal the finding of the single Judge as to the weight of evidence will not be interfered with.

The foreman of a grand jury is an officer who can certify to depositions, in order that the same may be used here.

Per DUBUC and KILLAM, JJ.—The offence of being accessory to a murder is included in the offence of murder under the Extradition Act.

Per TAYLOR, C.J.—In determining whether the offence charged constitutes a crime within the Extradition Act, the law of the date of the offence governs, and not that of the time of the treaty.

McMAHON v. MASTER.

County Court Appeal—Security—Objection.

By the County Court Act, 1887, the giving security for or depositing in the Court the amount for which judgment has been recovered and a sum sufficient to cover the probable costs of the appeal is a condition precedent to the right to appeal.

An objection that such conditions have not been complied with may be taken when the appeal comes on to be heard, and may be supported by affidavits.

[TAYLOR, C.J.

In re ASHBAUGH.

Attorney and client—Agreement that attorney not to account for moneys received—Business done before a magistrate

An attorney was employed to conduct the entire defence of a prisoner. He appeared upon the preliminary investigation before a police magistrate. He received money from the prisoner. Upon an application for the delivery of his bill he swore that it had been agreed that he was to use the money in procuring the prisoner's release, but was to keep no account of the money paid out. This the client denied.

Held, 1. That the attorney should deliver an ordinary bill of costs.

2. That such an agreement must be in writing.

McCARTHY v. BADGLEY.

Real Property Act—Issue—Security for costs.

B. applied for a certificate of title under the Real Property Act. McC. filed a caveat, and an order was made for the trial of an issue, in which he was made plaintiff. B. applied for security for costs.

Held, that B. was in reality the plaintiff and could not obtain security for costs.

COUTINE v. McKAY.

Stoppage in transitu—Insolvency of consignee—Proof.

Goods while in transit were seized by a sheriff under an execution against the consignee and removed from the custody of the carrier.

Held, that the consignor could not, after such removal, stop in transitu.

Semble, 1. By insolvency, in such cases, is meant a general inability to pay debts, of which the failure to pay one just and admitted debt would probably be sufficient evidence.

2. A vendor, who in good faith and in ignorance of the embarrassed circumstances of a customer, sold goods to him, may, on discovery of the customer's insolvency, exercise the right of stoppage in transitu.

BRITISH LINEN CO. v. McEWAN.

Foreign judgment—Defences which might have been raised— Counter-claim— Foreign affidavit.

A plea to an action on a foreign judgment of the Statute of Limitations ought not to be struck out as embarrassing, where the statute could not have been pleaded in the foreign country. Nor should a counter-claim be struck out where, at all events, the defendant was not bound to raise it in the original action.

Irregularities in foreign affidavits treated leniently.

MORRISON v. CITY OF LONDON FIRE INS. CO.

Discovery—Insurance cases—Production upon examination of copies of papers.

In an action upon an insurance policy the plaintiff may be compelled to produce upon his examination in the cause copies of the claim papers sent by him to the Insurance Company.

Semble, that in all actions the parties may, upon such an examination, be compelled to produce all documents which they would be bound to produce if called upon for discovery in equity.

McMASTER v. JONES.

Attachment—Foreign parties—Form of affidavit.

In order that the goods of a foreign defendant may be attached it is essential that the plaintiff be a resident of this Province.

When the parties to a note both reside in a foreign country, the presumption is that the note was made there.

An affidavit for an attachment must state whether or not the defendant is a corporation.

SAUL v. BATEMAN.

Committal for non-payment of costs—Means to pay.

Upon an application to commit two persons for non-payment of a judgment for costs, it appeared that they were two of the members of a firm engaged in carrying out several contracts. One contract was completed, and out of it a profit had been made which had not been divided but had been used in the work

under the other contracts, It was uncertain whether profit or loss would accrue from the other contracts.

Held, that the facts did not establish that the debtors had had means to pay the judgment debt.

[KILLAM, J.

In re ASSINIBOINE VALLEY S. & D. F. CO.

Company—Winding-up Act—Remuneration of liquidator.

An application by a liquidator to fix the remuneration should be supported by an affidavit shewing the number of hours devoted by him and his clerks to the business of the liquidation.

No charge can be made for time spent in procuring his own appointment or opposing his discharge.

Scale of remuneration and business for which it is allowed discussed.

[BAIN, J.

STEVENS v. ROGERS.

Interpleader—Sheriff's costs—Appeal for costs.

An execution creditor directed a sheriff to interplead between the creditor and a claimant of the goods seized. Upon the return of the interpleader summons the creditor obtained an enlargement to examine the claimant. Upon the further return the creditor abandoned.

Held, that the creditor ought to pay the sheriff's costs of the proceedings.

2. That the refusal of the referee to allow such costs might be appealed from.

VAUGHAN v. BUILDING AND LOAN ASSOCIATION.

Landlord and tenant—Notice of demand, etc.—Husband and wife—Joinder of causes of action.

A count by tenant against landlord for seizing and selling as for distress, without giving the notice required by 46 & 47 V. c. 46, s. 6, whereby the tenant lost the difference between the value of the goods and the amount realized by their sale,

Held, bad on demurrer.

Counts in trespass to the goods of a husband cannot be joined with counts for unlawful distress of the goods of the wife; and such counts may be demurred to.

Supreme Court of Canada.

ONTARIO.] [22ND JANUARY, 1890.

THE HALDIMAND DOMINION ELECTION CASE.

Elections—Dominion Elections Act—Corrupt act—Bribery by agent—Proof of agency.

An election petition charged that H., an agent of the candidate whose election was attacked, corruptly offered and paid $5 to induce a voter to refrain from voting. The evidence showed that H. was in the habit of assisting this particular voter and that, being told by the voter that he contemplated going away from home on a visit a few days before the election and being away on election day, he promised him $5 towards paying his expenses. Shortly after the voter went to the house of H. to borrow a coat for his journey, and H.'s brother gave him $5. He went away and was absent on election day.

Held, that the offer and payment of the $5 formed one transaction and constituted a corrupt practice under the Elections Act.

The proof of H.'s agency relied on by the petitioner was that he had been active on behalf of the same candidate at former elections; that he had attended a committee meeting held on behalf of the candidate and taken part in going over the list of voters; and that he acted as scrutineer in the election in question. It was also shown that there was no regular organization of the party at the election, but the candidate had addressed a mass meeting of the electors and stated that he placed his interests in their hands.

It was contended that every member of the party was thereby constituted his agent.

Held, affirming the judgment of FALCONBRIDGE, J., the trial Judge, RITCHIE, C. J., dissenting and TASCHEREAU, J., hesitating,

that the agency of H. was sufficiently established to make the candidate liable for his acts, and the candidate was rightly unseated for bribery by H.

Aylesworth, for the appellant.

McCarthy, Q.C., for the respondent.

QUEBEC.] [4TH DECEMBER, 1889.

CHAGNON v. NORMAND.

Appeal to Supreme Court of Canada—Jurisdiction—R. S. C. c. 135, s. 29 (b) —Future rights—Quebec Election Act—Arts. 414, 429—Action for penalties for bribery—Effect of judgment—Disqualification.

By Art. 414 of the Revised Statutes of Quebec any person guilty of bribery at a provincial election is liable to a penalty of $200 for each offence, for which any person may sue.

By Art. 429 any person convicted on indictment of such bribery is disqualified for seven years from being a candidate at an election or holding office under the Crown.

N. brought an action for bribery under Art. 414 against C., in which penalties to the extent of $400 were imposed on C. The Court of Queen's Bench affirmed the judgment imposing such penalties, and C. sought to appeal to the Supreme Court of Canada. On motion to quash the appeal for want of jurisdition :—

Held, that even if the judgment imposing penalties had the effect of disqualifying C., as if he had been convicted under Art. 429, no appeal would lie. The only ground of jurisdiction would be that future rights would be affected by the judgment; but under s. 29 (b) of the Supreme Court Act the future rights must be affected by the matter actually in controversy, and not by something collateral thereto.

Semble, that the judgment would not have the effect of so disqualifying C.

Gormully, for the respondent.

Christopher Robinson, Q.C., for the appellant.

HOOD v. SANGSTER.

Appeal to Supreme Court of Canada—Action for partition and licitation of property—Partnership—Plaintiff's interest less than $2000—Not appealable—R. S. C. c. 135, s. 29.

An action was instituted by the respondent against the appellant for the partition and licitation of a cheese factory, etc., in order that the proceeds might be divided according to the rights of the parties, who had carried on business as partners. The judgment appealed from ordered the licitation of the factory and its appurtenances. On a motion to quash the appeal by the respondent on the ground that the matter in controversy was under $2000, the appellant in answer to the respondent's affidavit filed another affidavit showing that the total value of the property was $3000, but it being admitted that the respondent (plaintiff) claimed but one-half interest in the property, it was

Held, that, the matter in controversy and claimed by the respondent not amounting to the sum or value of $2000, the appeal should be quashed with costs.

Duclos, for the respondent.

MacLennan, for the appellant.

MONTREAL STREET RAILWAY CO. v. RITCHIE.

Injunction—41 V. c. 14, s. 4 (P. Q.)—Action for damages—Want of probable cause—Damages other than costs.

When a registered shareholder of a company, finding the annual reports of the company misleading, applies after notice for a writ of injunction to restrain the company from paying a dividend, and where upon such application the company do not deny, even generally, the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient probable cause for the issue of such writ, and consequently the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the injunction.

Per TASCHEREAU, J.—Where a party maliciously and without reasonable and probable cause has instituted civil proceedings

against another, the latter has a right of action for damages resulting from such vexatious proceedings.

Brown v. *Gugy*, 16 L. C. Jur. 227, approved of.

Geoffrion, Q.C., and *Abbott*, Q.C., for the appellants.

Lonergan and *Lafleur*, for the respondent.

NEW BRUNSWICK.] [26TH OCTOBER, 1889.

WHITE v. PARKER.

Appeal to Supreme Court of Canada—Jurisdiction—Death of plaintiff—New cause of action—Lord Campbell's Act—Actio personalis moritur cum persona.

P. brought an action against a railway conductor for injuries received in attempting to board a train. He was nonsuited on the trial of the action, and the Supreme Court of New Brunswick set aside the nonsuit and ordered a new trial. Between the verdict and the judgment of the Court below P. died, and a suggestion of his death was entered on the record in the Court below. On Appeal to the Supreme Court of Canada from the judgment ordering a new trial:—

Held, that by the death of P. a new cause of action arose under Lord Campbell's Act, in favour of his widow and children, and the original action was, therefore, entirely gone and could not be revived. There being, therefore, no cause before the Court, the appeal was quashed without costs.

E. McLeod, Q.C., for the appellant.

W. Pugsley, for the respondent.

McDONALD v. GILBERT.

Partnership—Proof of—Name of partners on letter heads—Action for trifling amount.

G. bought goods from a person representing himself as agent of a firm in Toronto, and the goods were sent from Toronto to G. at St. John, N. B. In order to get the goods G. was obliged to pay the freight, which he demanded from the firm, claiming that by his agreement with the agent he was to receive the goods at St. John on payment of the price. Some correspondence passed between G. and the firm and letters were received by G. written on paper containing the name of the firm and under it

the names of individuals. In an action by G. to recover the freight:—

Held, affirming the judgment of the Supreme Court of New Brunswick, that the representation of the agent, coupled with the receipt of the letters, was sufficient *prima facie* evidence that the persons whose names were printed on the letter heads constituted the firm.

It appeared that the amount for which the action was brought was only $22, and the Court, though unable to refuse to hear the appeal, expressed strong disapproval of the appellant's course in bringing an appeal for such a trifling amount.

Weldon, Q.C., for the appellants.

Barker, Q.C., for the respondent.

[28TH OCTOBER, 1889.

SCAMMELL v. JAMES.

Appeal to Supreme Court of Canada—Jurisdiction—Security for costs—Benefit of bond for—Practice.

S. brought an action by writ of capias in the Supreme Court of New Brunswick against J., who was arrested and gave bail. By the practice in bailable actions in that Province it was necessary for the defendant to enter into special bail within a specified time after his arrest, and judgment must be entered within a specified time after such special bail is entered into. The plaintiff delayed signing judgment, and on application to a Judge in Chambers an order was made discharging the bail and directing an exoneretur to be entered on the bail bond. On motion to the full Court this order was sustained, and the plaintiff appealed to the Supreme Court of Canada. The proceedings in the Court below and on appeal were in the original suit against J., and the bond for security for costs was made in favour of J.

Held, that the bail, the parties principally interested in the appeal, not being entitled to the benefit of the security for costs, the appeal could not be entertained for want of security, and the time for giving security having elapsed, the defect could not be remedied.

Held, also, that the matter was one of the practice of the Court below and on that ground not appealable.

McLeod, Q.C., and *C. A. Palmer*, for the appellants.

I. A. Jack, for the respondent.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 21st December, 1889.

In re HIBBITT v. SCHILBROTH.

Prohibition—Division Court—Substitutional service of summons—Defendant out of Ontario—R. S. O. c. 51, s. 100.

At the time of the issue of the summons in a Division Court plaint the defendant was in Ontario, but she left without its having been served upon her, and an order was made after she had left for substitutional service. In the material upon which she supported a motion for prohibition she did not negative the existence of such facts as would give jurisdiction to made an order for substitutional service, and from her own affidavit it was to be inferred that the summons had come to her knowledge.

Held, that, as the Judge in the Division Court had jurisdiction under s. 100 of R. S. O. c. 51, as amended by 51 V. c. 10, s. 1, to order substitutional service if certain facts were made to appear, and as the defendant was subject to the summons at the time it was issued, it was for the Judge to determine whether the facts necessary to give jurisdiction appeared; and his determination could not be reviewed by the High Court.

Schoff, for the plaintiff.

John Greer, for the defendant.

CHANCERY DIVISION.

[The Divisional Court, 23rd December, 1889.

SWITZER v. LAIDMAN.

Slander—Pleading—Admission—Justification—Mitigation of damages.

Action for slander, wherein it was charged that in April, the defendant said to A. that the plaintiff had entered her mother's

house three or four times and had stolen in all about three or four hundred dollars.

The defendant in her statement of defence pleaded that the plaintiff "admitted and confessed to A. K. that it was he who had taken the money."

The trial Judge refused to allow evidence to be given in support of the above plea, insisting that the defendant if she wished to give such evidence must enter a formal plea of justification.

Held, that the above ruling was right, but that objection should have been made to the pleading either by demurrer or by application to strike it out as embarrassing; and there ought to be a new trial with leave to replead or amend the pleadings. The defendant could only set up the matters in question above pleaded in mitigation of damages, by adding thereto on the record that she had now good cause for discrediting that part of the admission or confession alleged to have been made by the plaintiff to A. K., although she honestly believed it to be true at the time she repeated the words complained of.

Carscallen, for the plaintiff.

Lynch-Staunton, for the defendant.

RYAN v. McCONNELL.

Bills and notes—Notes as collateral security—Laches of creditor—Release of principal debtor—Necessity of proving actual injury.

Where promissory notes of third persons were assigned by the defendant without indorsement as collateral security for a debt due by him to the plaintiff, and the plaintiff now sued the defendant for the amount of the debt and the defendant raised the objection that the plaintiff had been guilty of laches in proceeding for the payment of the collateral notes :—

Held, that if the defendant had been injured by such laches and to the extent to which he had been injured he should be exonerated from payment, but not otherwise; and the trial Judge had pushed the law too far against the plaintiff in holding that having found the laches as a matter of fact, it was a conclusion of law that detriment had followed to the defendant.

Haverson, for the plaintiff.

G. G. Mills, for the defendant.

[BOYD, C., 27TH NOVEMBER, 1889.

MACKLIN v. DANIEL.

Will—Legacies—Investment—Period of distribution.

A testator by his will gave two legacies to become due and payable in three and four years respectively from his decease, and instructed his executors to invest the same and pay the interest to the beneficiaries, and directed that two separate sums should be invested for the benefit of two other legatees (one of whom was his sister) and the interest paid them for their lives. He then proceeded: "And should there be a residue or surplus after paying out the foregoing bequests, I will that the same be equally divided between my sisters and S. J. R. or the survivors of them at the time of winding up the affairs."

Held, that the time for the division of the residue was when sufficient funds were invested to produce the legacies and fulfil the directions of the will, and that it was not postponed until the legacies should be paid over, or to any subsequent time.

A. Cassels, for the plaintiffs.

J. C. Hamilton, for the defendant S. J. Reesor.

W. M. Douglas, for the two sisters.

[19TH DECEMBER, 1889.

DAWSON v. FRAZER.

Will—Construction—Maintenance—Vested interest—Death of party entitled to maintenance.

Where a will gave the rents of the testator's farm for the support and maintenance of "the family now at home," and directed that the said rents should be so applied till the youngest surviving child came of age, and it appeared that one of the children so entitled to a share of the rents had died although the youngest surviving child had not yet come of age:—

Held, that the share of the deceased child in the rents devolved upon her personal representatives.

The distinction is marked in the cases between those where a provision is made for maintenance of indefinite duration and those where the duration is defined by the testator. In the former case the provision will not be carried beyond the life of

the beneficiary; in the latter it goes on for a prescribed period notwithstanding the death of the beneficiary, because to avoid an intestacy the Court will adjudge it to the representatives of the deceased.

Shepley, for Johanna Dawson.

E. D. Armour, for the infant.

IN CHAMBERS.

[BOYD, C., 20TH DECEMBER, 1889.

PHELPS v. ST. CATHARINES AND NIAGARA CENTRAL R. W. CO.

Railways and railway companies—Bonds—Debentures—Charge on the "undertaking"—Earnings of road—44 V. c. 73, s. 35, (O.)

Appeal from an order of the local Judge at St. Catharines directing an issue between the plaintiffs, who sought to attach certain moneys of the defendants, being a bank deposit of moneys collected from the earnings of the road, on the one part, and the bond-holders of the defendants, who claimed a charge upon such moneys, on the other part.

The Act of incorporation of the defendants, 44 V. c. 73, s. 35, (O), enacted that the bonds of the defendants were "to be taken and considered to be the first and preferential claims and charges upon the undertaking."

Held, that the bond-holders under the above section were entitled to a preferential charge upon the deposit. In railway parlance the "undertaking" has been defined to mean the complete work from which returns of money or earnings arise, and a charge upon the undertaking means that these earnings are liable for the satisfaction of the charge.

Aylesworth, for the appellants.

H. H. Collier, for the plaintiffs.

[THE MASTER IN CHAMBERS, 6TH JANUARY, 1890.

STECKLE v. BYERS.

Stop order—Application for by simple contract creditor.

Middleton, for one Dawson, a creditor of the defendant, moved *ex parte* for a stop order upon a fund in Court to which the

defendant was entitled. The applicant had not obtained judgment against the defendant, but another creditor had execution against the defendant in the sheriff's hands, and it was contended on the applicant's behalf that it was sufficient that the defendant was an execution debtor, for that being so, not only execution creditors but all creditors would under the Creditors' Relief Act be entitled to share in the fund ; citing *Dawson* v. *Moffatt*, 11 O. R. 484.

It was shewn by affidavit that a debt was due to the applicant by the defendant.

THE MASTER IN CHAMBERS made the order as asked, referring to a former decision of his own in *Squire* v. *Oliver* on the 1st June, 1886, where he had held a Division Court creditor entitled to a stop order prior to judgment because of his right by the Division Court procedure to attach moneys in the hands of a garnishee immediately upon the issue of a summons.

NORTH-WEST TERRITORIES

In the Supreme Court.

(MACLEOD, J., 14TH JANUARY, 1890.

FLOWERS v. DEANE.

North-West Mounted Police—Powers of officers—Interference with private property of constable—Ultra vires—R. S. C. c. 45.

The plaintiff, who was a constable in "K" division of the North-West Mounted Police, sued the defendants Deane and Jarvis, who were respectfully Superintendent and Sergeant-Major of the division, for $100 damages for killing his dog. The statement of claim claimed judgment either against both defendants or such one or other of them as the Court should find liable. The defendant Deane denied that he killed the dog, and denied property in the plaintiff. In addition to similar defences the defendant Jarvis justified by setting out that in killing the dog he was acting under instructions of his superior officer, by whom an order had been made that non-commissioned officers

and men should register their dogs in the Sergeant-Major's office, and that any dogs found in barracks without tags and owners should be destroyed; and that the dog in question had been so found, and was destroyed in pursuance of such order. The plaintiff replied setting up as points of law that the order in question was illegal and invalid on its face, and was no justification for the tort of the defendant Jarvis.

On the questions of law raised by the pleadings,

C. C. McCaul, for the plaintiff. There can be no question that if the parties were private citizens the defendants would be liable to the plaintiff as joint tort-feasors. It is submitted that the relationship between the parties does not justify the killing of the plaintiff's dog. The North-West Mounted Police force is the creature of statute; and the powers given to officers under the statute must be strictly pursued. For disobedience to orders, or breach of discipline the punishments provided by the Act R. S. C. c. 45 are by way of fine or imprisonment, but no power whatever is given to any officer to interfere with the private property of the men. The order is plainly illegal on its face, and is no justification to either defendant.

C. F. P. Conybeare, for the defendants, was not called upon.

MACLEOD, J.—It is necessary to the discipline of the force and the preservation of order in barracks that the officers should have power to regulate such matters. If a policeman can keep one dog he can keep twenty in barracks. Mr. McCaul argues that the remedy is against the man by fine and imprisonment, and not against the dog. I cannot agree with this argument; the only effectual remedy to prevent the barracks being overrun with dogs, is to destroy them, unless they are tagged and registered.

Judgment for the defendants.

[Leave to appeal was refused.]

[17TH JANUARY, 1890.

CASEY v. DEMPSEY.

Bond of indemnity—Damages—Pleading.

The statement of claim alleged that the defendant had covenanted to assume and pay at maturity certain promissory notes made by the plaintiff, and all costs, charges, and expenses by

reason of such non-payment; that the defendant did not pay one of the said notes; and that there "still remains due and owing on the same * * * the sum of $108.64, which amount the plaintiff claims from the defendant * * The plaintiff also claims from the defendant the sum of $49.24, being amount of costs incurred by reason of non-payment of the said note."

The defendant by his statement of defence objected that the statement of claim was bad in law "because it does not show that the plaintiff has suffered any loss or damage by reason of the cause alleged in said statement of claim, and does not show that the plaintiff has paid any sum for debt or costs on said notes."

The plaintiff having refused to amend:—

Held, following *Gray* v. *McMillan*, 22 U.C.R. 456, that the statement of claim did not disclose any cause of action. Action dismissed with costs.

Jas. P. Mitchell, for the plaintiff.

C. C. McCaul, for the defendant.

[McGuire, J., 5th October, 1889.

In re ANGUS THOMPSON.

Registry laws—Territories Real Property Act, R. S. C. c. 51, ss. 4, 45—Lands not under Act—Unregistered conveyance, effect of—Execution against vendor certified to Registrar before registration of conveyance—Priorities.

Section 4 of the Territories Real Property Act, R. S. C. c. 51, which provides that "From and after the commencement of this Act, all lands in the Territories shall be subject to the provisions hereof," means that all lands in the Territories *may* become under the Act; and lands the patent for which had issued before the 1st January, 1887, are not under the Act until an application is made under s. 45.

And where F. in March, 1887, conveyed to T. land patented before the 1st January, 1887, by a deed in fee simple, which was not registered or brought into the registry office until after an execution against the lands of F. had been placed in the sheriff's hands and certified to the Registrar:—

Held, that F. ceased to be the owner or to have any interest in the land on delivery of the deed; and the execution against F. was no lien or charge upon the land.

This matter was referred to a Judge by the Inspector and Acting Registrar of the East Saskatchewan Land Registration District under s. 114 of the T. R. P. Act, R. S. C. c. 51.

The facts were as follows :—

On 8th March, 1887, one James Fraser, who was then the owner of the land in question, having purchased it from the patentees, sold it to one Angus Thompson for $500, giving him a deed in fee simple. This deed was not registered or brought into the Registry Office until after an execution against the lands of Fraser at the suit of one Lovell had been placed in the sheriff's hands, and a copy thereof, certified by the sheriff to be a true copy of such execution, together with a memorandum signed by the sheriff of the lands intended to be charged by said execution, had been handed to the Registrar. The lands mentioned in that memorandum were the same as mentioned in certificate No. 453. The copy of execution and memorandum were handed by the sheriff to the Registrar on 8th June, 1888.

Subsequently and on the 4th of March, 1889, Angus Thompson made application to have his title registered pursuant to ss. 45 and 46 of the T. R. P. Act, and upon such application produced the deed from Fraser to him.

The Registrar on that application issued a certificate of ownership No. 453 to Thompson, but " subject to incumbrances, liens, and interests notified by memorial underwritten or indorsed " thereon; and at the foot thereof appeared the following memorials:

(1) The above lands are charged with a writ of execution dated 8th June, 1888, wherein William Lovell is plaintiff and James P. Fraser is defendant.

(2) The above lands are charged with a writ of execution dated 4th March, 1889, wherein Andrew E. Porter is plaintiff and Samuel G. Miller and James P. Fraser are defendants.

The certificate No. 453 appeared by the indorsement thereon to have been entered and registered at 3.15 p.m. on 4th March, 1889, as No. 15 in Day Book B., and so was prior in point of registration to the writ of execution secondly above mentioned in *Porter* v. *Miller and Fraser*.

The question submitted was whether the Registrar was right in issuing the certificate of ownership subject to the memorials of the two executions.

The certificate of ownership was certified by the Registrar to have been registered at 3.15 p.m. on 4th March, 1889, and the execution in *Porter* v. *Miller* was certified as having been registered at 3.25 p.m. on same day, so that on the face of the two

documents it appeared that the certificate was registered ten minutes before the execution in the *Porter* case was registered.

On receiving the reference from the Registrar McGuire, J., issued a summons to all parties interested to show cause in relation to the matter, returnable on 17th September, 1889, when the case was argued.

Maclise, for Lovell. Under s. 59 of the T. R. P. Act, on instrument passes any title or interest until registered, and the deed from Fraser to Thompson not being registered at the date when the execution in *Lovell* v. *Fraser* was delivered by the sheriff to the Registrar, in pursuance of s. 94 of T. R. P. Act, the defendant Fraser must still be deemed the owner, and the land was therefore bound by the execution, and any transfer by him must be subject to that writ.

Brewster and *McKay*, for Thompson, *contra*. As the patent for the land had issued before the 1st January, 1887, it was not under the provisions of the T. R. P. Act until the application by Thompson to have his title registered, and therefore s. 59 does not apply, but the deed from Fraser must be taken to have passed the title in fee to Thompson on its delivery, and as this was long prior to the execution, Thompson was entitled to the land free from the same.

Gunne, for Porter.

McGuire, J.—(after stating the facts as above)—As to the latter execution, namely that in the suit of *Porter* v. *Miller and Fraser*, there is no difficulty whatever, as it was subsequent both in date and time of reaching the Registrar's hands to the deed from Fraser to Thompson; so that it is quite clear it ought never to have appeared in the certificate of ownership.

But as to the other execution the matter is not by any means so clear or free from difficulty.

There is no suggestion against the *bona fides* of the deed from Fraser to Thompson, or that it was executed otherwise than as it purports to be, so that the single question to be considered is whether the execution in *Lovell* v. *Fraser* constitutes a charge on the lands in the hands of Thompson. This is the first case of the kind that has arisen in the Territories.

Section 4 of the Act says that "All lands in the Territories shall be subject to the provisions of this Act." Certainly at first sight this would seem to indicate that on and after the 1st January, 1887, when this Act came into force, the various pro-

visions of the Act were intended to apply to all lands and all dealings therewith.

But in subsequent sections, commencing with s. 34, the word "land" is qualified by the uniform phrase "under the provisions of this Act." Now, if the words "subject to the provisions of this Act" in s. 4 have the wide meaning they at first sight appear to have, then *all lands* would be "under the provisions of the Act;" and it would be not only unnecessary but misleading to use the phrase "under the provisions of this Act" in s. 34 and the many other places in which it appears. These words are evidently used to distinguish lands which are from others which are not "under the provisions, etc.," so that we must see if the words "subject to" in s. 4 have not a meaning different from the word "under" in s. 34, etc. Looking at Worcester's dictionary I find that "subject," in addition to its primary meaning of "placed under" also means "exposed," "liable," and examples of its use in this sense are given from the writing of Shakespeare and Dryden; from the former "most subject is the fattest soil for weeds;" and from the latter "all human things are subject to decay," meaning not that "fattest soils" are actually "weedy," or "all human things" actually in a state of "decay," but only that they are respectively "liable to" or exposed to become so whenever certain conditions are fulfilled.

If we take this meaning, then we may interpret s. 4 as saying that all lands may become under the Act; and then ss. 44 and 45 deal with two classes; the former with lands where patent had not issued on 1st January, 1887; the latter with lands where the patent had issued before that date.

In the former case the lands come under the Act by the patent being transmitted direct to the Registrar, whereupon he issues the certificate to the patentee; in the latter an application may be made by the owner, the procedure for which is provided, and when on that application a certificate is issued, then the land becomes "under the provisions of the Act;" but until such application the land is not actually under the Act, and the registration provisions do not apply. I, however, think that ss. 5 to 17, both inclusive, form a part of the Act distinct from the rest, and that they took effect from the 1st January, 1887, and the amending Act of 1888 so interprets these sections, which again furnishes another reason for distinguishing between these thir-

teen sections and the rest of the Act, since the Legislature by limiting the interpretation to these sections implicitly declares that the whole Act was not "intended to extend, etc." Another circumstance strongly confirming this view is that in these sections we find the words "deed" and "deed or transfer" repeated, and s. 6 defines what a "deed" shall convey. Now the instruments to be used under the Act are none of them *deeds*, not being under seal, and these sections therefore seem clearly to provide for the use both of deeds, which must mean instruments under the law as it existed before the Act, and "transfers," the new forms of conveyance introduced by the Act, according as the land is or is not "under the provisions" of the Act.

Section 34 deals with lands which are "under the provisions" of the Act, and the form of instruments "purporting to transfer, etc.," such lands, and it is to be noted that the word "transfer" and not "deed" is used here as being the term appropriate to conveyances under the Act.

Section 58 also expressly deals with land under the provisions of the Act, and while s. 59 does not contain the qualifying phrase, I think that it must be read along with the preceding sections and as one of seven sections (58 to 64) put under the heading, "Effect of registration," and the concluding words of s. 59 seem to presuppose the existence of a certificate of title and therefore confirm the view that it applies only where the land has been brought under the Act under either s. 44 or s. 45. Moreover, s. 64 declares that "after registration of the title to any land under the provisions of this Act no instrument shall be effectual to pass any interest, etc.," unless two things concur: (*a*) It is executed in accordance with the Act; and (*b*) it is duly registered thereunder. But s. 34 had already dealt with (*a*), and if s. 59 applied to all lands and all instruments, then it had already rendered impossible the registering of the instrument whether before or after registration of the title. In order, however, to give s. 64 a reasonable construction it is necessary to read s. 59 as applying only to lands after issue of a certificate of ownership and the instruments in the schedule, and then s. 64 as declaring that as against a *bona fide* transferee of the land under this Act the conditions therein mentioned must be complied with.

If I am correct in this, then, notwithstanding the T. R. P. Act, as far at least as lands are concerned which have not yet been

brought under the Act by s. 44 or s. 45, the old law is in force and a deed passes the interest it purports to pass, and on delivery of the deed to Thompson, Fraser ceased to be owner of or in any way entitled to any interest whatever in the land in question, and the execution against Fraser, which came in long subsequent, was no lien or charge thereon, either under the provisions of s. 94 or otherwise, and the certificate of ownership should have issued without being expressed to be subject to the Lovell or Porter executions.

There are many other difficulties in the way of these executions and to which I may allude, lest silence with regard to them might be misunderstood, but, as I rest my opinion on the reasons already advanced, I shall deal with them more briefly than might otherwise have been done. * * * *

I think the certificate should have issued to Angus Thompson, and that not subject to either of the executions referred to, and I order the Registrar, after the expiration of four weeks from the date hereof, unless in the meantime such order is appealed from, to register the title of the applicant, Angus Thompson, and issue to him a certificate of title under this Act.

IN CHAMBERS.

[Macleod, J., 28th December, 1889.

FLOWERS v. DEANE.

Discovery—Order to examine defendants.

The plaintiff applied *ex parte* for an order to examine the defendants on their defence. The plaintiff's advocate filed his own affidavit stating that the writ of summons and statement of claim were duly served on the 16th October, 1889; that the defendants had duly appeared and had delivered their defence on the 8th November, 1889; and that in his opinion the plaintiff could not safely go down to trial without an examination of the defendants on their statement of defence.

Macleod, J.—The application is, I suppose, made under s. 185, C. J. O. The examination of an opposite party, particularly a defendant, is ordered only under very special circumstances. I do not think sufficient grounds are shewn here for granting the order, and I must refuse it.

ATTORNEY-GENERAL v. CRAIG.

Discovery—Affidavit of documents.

This was an application by the plaintiff for an order, as of course, for discovery by the defendant by affidavit of documents.

MACLEOD, J.—I cannot grant this order upon mere request and without knowing anything about the action. The application is, I suppose, made under s. 144, C. J. O. The latter part of this section requires that I should be satisfied as to the necessity of ordering discovery.

[15TH JANUARY, 1890.

CRONYN v. DARCH.

Security for costs—Plaintiffs out of jurisdiction—Counter-motion for judgment—Discretion of Judge to hear together—Affidavit of merits—Cross-examination—Affidavits in answer.

This was an action brought on a judgment recovered by the plaintiffs against the defendant in the Court of Queen's Bench in Manitoba. The plaintiffs resided in Ontario. The defendant, having appeared, served notice of motion for an order for security for costs, supported by an affidavit that he was advised and believed he had a good defence on the merits. The same day the plaintiffs served notice of motion to strike out appearance and for judgment under s. 79, C. J. O., filing affidavits proving the exemplification of the judgment and proceedings in Manitoba, from which it appeared that the defendant had defended the Manitoba action, and had appealed from the judgment, which was affirmed by the full Court. The affidavit further stated, in compliance with the ordinance, that in the deponent's belief there was no defence to the action. Both motions were made returnable on the same day, at the same hour, irregularities in service being waived on both sides.

On the return of the defendant's motion, the plaintiffs' advocate called the attention of the Judge in Chambers to the fact that a motion to strike out appearance and for judgment was pending, and asked that the motions should be disposed of together. The defendant's advocate objected that this would be putting the defendant to costs, and that he had an absolute right to have the motion for security disposed of first.

Held, that the Judge in Chambers had a discretion in the matter, and that under the circumstances the motions should be heard together.

The plaintiffs' advocate proposing to read an affidavit, setting out the proceedings in the Queen's Bench in Manitoba, and an exemplification of judgment, in answer to the affidavit of merits:—

Held, that the affidavit, being explanatory, was admissible.

Held, also, that under s. 218, C. J. O., the plaintiffs were entitled to cross-examine the defendant on his affidavit, subject to objections by the defendant as to the particular questions asked, and the motion was adjourned to allow the examination to be held. The advocates for both parties having been heard on the motion for security, the defendant's advocate refused to appear on plaintiffs' motion; and

The plaintiffs' motion to strike out appearance and enter judgment was granted; and the defendant's motion for security was dismissed with costs.

C. C. McCaul, for the plaintiffs.

W. A. Galliher, for the defendant.

Supreme Court of Canada.

QUEBEC]

ONTARIO & QUEBEC RAILWAY CO. v. MARCHETERRE.

Appeal to the Supreme Court of Canada—Jurisdiction—Interlocutory judgment—Final judgment—Art. 1116, C. C. P.—Amount in controversy not determined—Supreme and Exchequer Courts Act, ss. 28, 29.

STRONG, J., (in Chambers), dubitante as to the jurisdiction of the Supreme Court to hear an appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) and desiring to give the parties an opportunity of having the question of jurisdiction decided by the full Court, granted an application to allow the payment of $500 into Court as security for the costs of the appeal, as the time for appealing from the judgment would elapse before the next sittings of the Court.

On a motion to quash for want of jurisdiction before the full Court, it was

Held, 1. That a judgment of the Court of Queen's Bench for Lower Canada (appeal side), quashing a writ of appeal on the ground that it had been issued contrary to the provisions of Art. 1116, C. C. P., is not "a final judgment" within the meaning of s. 28 of the Supreme and Exchequer Courts Act.

Shaw v. *St. Louis*, 8 S. C. R. 387, distinguished.

2. *Per* RITCHIE, C. J., and STRONG, TASCHEREAU, and PATTERSON, JJ., that the Court has no jurisdiction where the amount in controversy upon an appeal by the defendant has not been established by the judgment appealed from. Supreme and Exchequer Courts Act, s. 29.

Appeal quashed with costs.

F. X. Archambault, Q.C., for the respondent.

H. Abbott, Q.C., for the appellants.

Exchequer Court of Canada.

[BURBIDGE, J., 20TH JANUARY, 1890.

CARTER, MACY, & CO. v. REGINAM.

Revenue—Customs duties—Goods in transitu.

The plaintiffs shipped teas from Japan to New York for transportation in bond to Canada. On the arrival of the teas at New York and pending a sale thereof in Canada such teas were allowed to be sent to a bond warehouse as unclaimed goods for some five or six months. They were entered at the New York Custom House for transportation to Canada, and forwarded to Montreal.

There was nothing to show that the plaintiffs at any time proposed to make any other disposition of the teas, and there was nothing in what they did that contravened the laws or regulations of the United States or of Canada with respect to the transportation of goods in bond.

Held, that the teas were not dutiable as teas from the United States, the transaction having taken place prior to the passing of the Act 52 V. c. 14, which expressly provides that in such case the teas would be dutiable.

D. MacMaster, Q.C., for the claimants.
R. Sedgewick, Q.C., and *W. D. Hogg*, Q.C., for the Crown.

REGINA v. GRAND TRUNK RAILWAY CO.

Interest--Contract—Damages in the nature of interest—Rate thereof—Claim for interest where principal accepted.

On a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is not to be implied.

In assessing damages in the nature of interest, on a bond payable at a particular place, reference should, in general, be had to the rules in force at the place where the same is so payable.

Quære: Will an action lie for interest not payable by contract, but as damages for the detention of a debt or money claim, where the principal sum had been paid to and received by the plaintiff before action brought?

Dixon v. *Parkes*, 1 Esp. 110; *Hellier* v. *Franklin*, 1 Starkie 291; *Beaumont* v. *Greathead*, 2 C. B. 494, referred to.

W. D. Hogg, Q.C., for the Crown.
John Bell, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [14TH JANUARY, 1890.

HANDS v. LAW SOCIETY OF UPPER CANADA.

Barrister and solicitor—Law Society—Disciplinary jurisdiction—Evidence—Notices—R. S. O. c. 145.

In exercising their disciplinary jurisdiction the Benchers of the Law Society, if they take evidence at all, must take it upon oath, unless the right to have the evidence taken upon oath is waived.

Where the plaintiff attended before the Discipline Committee and without objection allowed witnesses to make unsworn statements and examined them upon them, and made an unsworn statement himself:—

Held, that he could not, after the investigation was ended, take exception to the regularity of the proceedings on the ground that no oath was administered.

Nor could he take exception to the regularity of the proceedings, after the investigation was ended, on the ground, that the notice to the members of the Discipline Committee of the meeting to consider his case did not specify the nature of the business to be disposed of, nor on the ground that no notice of the meeting was sent to the Treasurer of the Society, *ex officio* a member of the Discipline Committee, he being at the time in Europe.

Judgment of the Queen's Bench Division, 17 O. R. 300, reversed, and that of BOYD, C., 16 O. R. 625, restored.

A. H. Marsh and *W. Read*, for the appellants.

C. J. Holman, for the respondent.

MAGEE v. GILMOUR.

Landlord and tenant—Expiration of term—Notice to quit—Sub-lease—Over-holding tenant.

This was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 17 O. R. 620.

McCarthy, Q.C., and *W. H. Barry*, for the appellants.

J. H. Macdonald, Q.C., for the respondent.

THE COURT, agreeing with the judgment below, dismissed the appeal with costs, holding that the tenancy, though by oral lease void under the Statute of Frauds, was a tenancy for a term certain, and not from year to year; that the sub-tenancy came to an end with the tenancy, and that the subsequent circumstances, fully set out in the report below, did not operate to create a new term as between the sub-tenants and the plaintiff.

ANDERSON v. FISH.

Sale of goods—Stoppage in transitu—Consignor and consignee—Right of carriers to prolong period of transitus.

This was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 16 O. R. 476.

G. T. Blackstock, for the appellant.

J. B. Clarke, for the respondent.

THE COURT dismissed the appeal with costs, agreeing with and adopting the reasons for judgment of the majority in the Court below.

MANDIA v. McMAHON.

Contract—Breach—Measure of damages.

The defendant, who was a contractor for certain work at Lancaster, Ontario, entered into an agreement with the plaintiffs that if they would go to New York and procure about two hundred labourers, he would give them work at $1.25 a day.

The plaintiffs were allowed as damages for the breach of this agreement, $25, their expenses in going to and returning from New York, and $700, the amount of advances made by them to

certain of the labourers to pay their fares from New York. They were not allowed commission that would have been received by them if employment had been furnished.

Judgment of the Queen's Bench Division affirmed.

McCarthy, Q.C., and *Aylesworth*, for the appellant.

H. Symons, for the respondents.

ROSS v. CROSS.

Negligence—Master and servant—Accident caused by defect in hoist.

The defendant was the owner of a tannery, for which a hoist had been built by a contractor, and was with the plaintiff, one of his employees, aiding the contractor in putting the hoist in place and in testing it. Owing to a defect in the mechanism, of which the plaintiff and defendant were ignorant, the hoist fell and the plaintiff was severely injured. Both parties were aware that no safety catches had been put in the hoist. The presence of these might have stopped the fall, but their absence had nothing to do with the occurrence of the accident.

Held, that the defendant was not liable.

Judgment ot the Queen's Bench Division directing a new trial set aside, and judgment of FALCONBRIDGE, J., at the trial restored.

McCarthy, Q.C., and *Pepler*, for the appellant.

Lount, Q.C., for the respondent.

LEITCH v. GRAND TRUNK R. W. CO.

Discovery—Examination of officer of railway company—R. S. O. 1877 c. 50, s. 156 (Rule 487)—Railway conductor—Reading depositions at trial.

An appeal from the decision of the Queen's Bench Divisional Court, 12 P. R. 671, that the plaintiff had the right to examine for discovery as an officer of the defendants the conductor of a train of the defendants through whose alleged misconduct the plaintiff was injured, was dismissed by reason of the disagreement of the Judges in this Court.

Held, per HAGARTY, C.J.O., and BURTON, J.A., that the conductor was not examinable as an officer under R. S. O. 1877 c. 50, s. 156 (Rule 487); and *per* OSLER and MACLENNAN, JJ.A., that he was examinable.

Per BURTON, J.A.—The only officers intended by s. 156 were such officers as might under the former system have been properly made defendants for discovery merely. The examination sought was not really for discovery; it was a fishing inquiry to ascertain before the trial what precise evidence a particular witness would give.

Per OSLER, J.A.—The test of the propriety of allowing an officer or servant of a corporation to be examined for discovery is his ability to give the necessary information. A person who is entrusted with the charge of a railway train in the course of its transit, the conductor of the train, is as to that particular occasion and for that particular purpose to be regarded as an officer of the corporation as distinguished from a mere servant, no matter how temporary his employment or how summary the corporation's power of dismissal.

Moxley v. Canada Atlantic R. W. Co., 15 S. C. R. 145, discussed.

Semble, per OSLER, J.A., that the depositions of an officer of a company upon examination for discovery can only be read against the company at the trial, if at all, when they have taken part in the examination.

Aylesworth, for the appellants.

W. R. Meredith, Q.C., for the respondent.

GIBBONS v. WILSON.

Assignments and preferences—Bills of sale and chattel mortgages—Actual advance—R. S. O. c. 124, ss. 2, 3.

A solicitor acting for a creditor obtained for the debtor on the security of a chattel mortgage a loan from another client, who was ignorant of the purpose for which the loan was required. The solicitor out of the moneys advanced paid off the creditor in full, and shortly after the debtor assigned.

Held, affirming the judgment of the Chancery Division, 17 O. R. 290, that the mortgage was one to secure a present actual *bona fide* advance, and could not be impeached.

Moss, Q.C., and *Garrow*, Q.C., for the appellant.
W. F. Walker, for the respondent.

GALT, C. J.] [10TH FEBRUARY, 1890.

GRANT v. PEOPLE'S LOAN AND DEPOSIT CO.

Mortgage—Interest post diem—Rate of.

The decision of GALT, C.J., 9 Occ. N. 389, affirmed.

Delamere, for the appellants.
H. T. Beck, for the respondent.

ARMOUR, C. J.] [14TH JANUARY, 1890.

JOHNSTON v. TOWNSHIP OF NELSON.

Municipal corporations—Highways—Bridges—Limitation of action—R. S. O. c. 184, ss. 530, 531.

An action to recover damages sustained by reason of the neglect of a municipal corporation to keep in repair the approaches to a bridge, where the bridge and approaches are under the jurisdiction of one municipality only, must be brought within three months after the damages have been sustained.

Section 530 of R. S. O. c. 184 applies only to cases where one municipality has jurisdiction over a bridge and another has jurisdiction over the adjacent approaches.

Judgment of ARMOUR, C. J., affirmed.

Carscallen, for the appellant.
Fullerton and *J. W. Elliott*, for the respondents.

PROUDFOOT, J.]

SWIFT v. PROVINCIAL PROVIDENT INSTITUTION.

Insurance—Life—Benevolent Society—R. S. O. c. 136—R. S. O. c. 172.

The "Act to secure to wives and children the benefit of Life Insurance," R. S. O. c. 136, applies to insurances in societies incorporated under the Benevolent Society Act, R. S. O. c. 172.

In re O'Heron, 11 P. R. 422, overruled.

Judgment of PROUDFOOT, J., reversed; BURTON, J. A., dissenting.

Rae, for the appellant.

J. S. Robertson, for the respondents.

ROSE, J.]

In re CROFT AND THE TOWN OF PETERBOROUGH.

Municipal corporations—By-law—Liquor License Act, R. S. O. c. 194, s. 42—Electors.

The electors entitled to vote upon by-laws under R. S. O. c. 194, s. 42, are those entitled to vote at municipal elections.

Judgment of ROSE, J., 17 O. R. 522, affirmed on other grounds.

Robinson, Q.C., and *E. B. Edwards*, for the appellants.

Poussette, Q.C., and *Aylesworth*, for the respondent.

C. C. HASTINGS.]

JOHNSON v. HOPE.

Assignments and preferences—Bankruptcy and insolvency—Bills of sale and chattel mortgages—Mortgage to secure money paid by mortgagee to creditor—Intent to prefer—Notice of insolvency—R. S. O. c. 124, s. 2.

A transaction entered into by a person in insolvent circumstances is not impeachable unless the person claiming the benefit of the transaction had notice or knowledge of the insolvency and did not act in good faith.

A security given by a person in insolvent circumstances to secure an actual advance made without notice or knowledge of the insolvency and in good faith is not impeachable because the moneys advanced are, pursuant to the direction of the insolvent, paid over to one of his creditors, who thereby obtains a preference.

Stoddart v. *Wilson*, 16 O. R. 17, discussed.

Judgment of the County Court of Hastings reversed.

Moss, Q.C., and *F. E. O'Flynn*, for the appellant.

Clute, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Justices in Banc, 21st December, 1889.

REGINA v. McMAHON.

Criminal law—Indictment for murder—Evidence, admissibility of—Statements of deceased after being shot—Complaint—Cross-examination of Crown witness—Particulars of complaint—Res gestæ—Dying declaration.

At the trial of the defendant upon an indictment for the murder of one H., a witness for the Crown swore upon direct examination that H. lived about thirty rods from him, and that one night, about half an hour after he had heard shots in the direction of H.'s house, H. came to the witness's house and asked the witness to take him in, for he was shot. The witness did so, and H. died there some hours afterwards.

Evidence of statements made by H. after being taken into the witness's house was rejected.

Upon a case reserved it was contended on behalf of the defendants: 1. That counsel for the defendant was entitled to ask the witness in cross-examination whether H. mentioned any particular person as the person who attacked him; 2. That statements made by H. after he arrived at the witness's house were admissible as part of the *res gestæ*; 3. That such statements or some of them were admissible as dying declarations.

Held, 1. That the admission of evidence of a complaint having been made ought properly to be confined to rape and its allied offences, but even if such evidence is admissible in other cases, it can only be so where the person making the complaint has been examined as a witness; and moreover in this case when H. asked the witness to take him in, for he was shot, he was not making a complaint at all, but merely assigning a reason for asking to be taken in, and the question proposed to be asked was not relevant.

2. That the statements made by H. after he was taken into the house were not admissible as part of the *res gestæ*, being made after all action on the part of the wrong-doer had ceased through the completion of the principal act, and after all pursuit or danger had ceased.

Regina v. *Bedingfield*, 14 Cox 341, and *Regina* v. *Goddard*, 15 Cox 7, followed.

3. That upon the evidence the statements made by H. after being taken into the house were not made under a settled hopeless expectation of death, and were therefore not admissible in evidence as a dying declaration.

J. R. Cartwright, for the Crown.

W. R. Meredith, Q.C., and *Pegley*, for the defendant.

[THE DIVISIONAL COURT.

HUBERT v. TOWNSHIP OF YARMOUTH.

Municipal corporations—Action to compel maintenance of road—Assumption of road by corporation—Statute labour done with consent of municipal officers—Remedy by indictment.

In an action to compel a municipal corporation to maintain and repair a street laid out by private persons, it appeared that such street was not established as a highway by by-law nor assumed for public user by any corporate act of the municipal corporation; but it was contended that the performance of statute labour thereon, with the consent of the pathmaster, and on one occasion with the consent of the councillor for the ward and of the reeve, was evidence that it was otherwise assumed for public user.

Held, that the acts required to work such an assumption must be corporate acts, clear and unequivocal, and such as clearly and unequivocally indicate the intention of the corporation to assume the road; and the acts relied upon in this case could not bind the corporation nor work such an assumption.

Held, also, following *Hislop* v. *McGillivray*, 15 A. R. 687, that even if the street had been assumed for public user, the plaintiffs' only remedy was by indictment, and the action was not maintainable.

G. T. Blackstock, for the plaintiffs.

Glenn, for the defendants.

MEAD v. TOWNSHIP OF ETOBICOKE.

Municipal corporations—Highway carried over railway—Liability of municipal corporation—Liability of railway company—R. S. O. c. 184, s. 531.

Notwithstanding any liability which may be cast by statute upon a railway company to maintain and repair a bridge and its approaches, by means of which a highway is carried over their railway, such highway is still a public highway, and as such comes within the provisions of the Municipal Act, R. S. O. c. 184, s. 531, requiring every public road, street, bridge, and highway to be kept in repair by the municipal corporation, who are not absolved from liabilty for default by the liability, if any, of the railway company.

Laidlaw, Q.C., and *Kappele*, for the plaintiff.

Robinson, Q.C., and *McMichael*, Q.C., for the defendants the township of Etobicoke.

McCarthy, Q.C., for the defendants the Grand Trunk R. W. Co.

WALKER v. BOUGHNER.

Specific performance—Contract to make provision by will for granddaughter—Action against executors—Uncertainty of promise and consideration—Services rendered to testator—Remuneration for.

Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligations.

But where the testator, the grandfather of the plaintiff, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but left her nothing by his will, and paid her nothing for her services, and she sued his executors for specific performance of an alleged contract or promise to make the same provision for her by his will as he should make for his own daughters, and in the alternative for wages :—

Held, upon the evidence, that the case did not fall within the rule ; the promise alleged to have been made and the consideration for it being both of too uncertain a character to entitle the plaintiff to come to the Court for a performance of the promise ;

but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in *loco parentis*, in the absence of special contract, whilst they form part of the household.

Decision of PROUDFOOT, J. varied.

Lash, Q.C., for the plaintiff.

Moss, Q.C., for the defendants.

[5TH FEBRUARY, 1890.

MILLIGAN v. SILLS.

Venue—Change of—Preponderance of convenience—County Court action—Appeal from Master in Chambers—Rule 1260—Appeal to Divisional Court.

Upon motion to change the venue from Toronto to Napanee in a County Court action, brought to recover $100 damages for breach of a contract by the defendant to sell a horse to the plaintiff, it appeared that the defendant resided in the county of Lennox and Addington and the plaintiff in Toronto, and that all the witnesses on both sides resided in Lennox and Addington except the plaintiff himself and one other in Toronto. The defendant swore that he required eleven witnesses at the trial. It was not clear where the cause of action arose, but the breach was probably where the defendant resided. The Master in Chambers refused to change the venue.

Held, by ROSE, J., in Chambers, that there was a very great preponderance of convenience in favour of having the action tried at Napanee, and the venue was accordingly changed.

Held, also, by ROSE, J., that an appeal lay to a Judge in Chambers from an order of the Master in Chambers under Rule 1260.

Held, by the Divisional Court, upon appeal, that the venue was properly changed to Napanee; and that, even if an appeal did not lie from the Master in Chambers to a Judge in Chambers, the latter had the right as upon a substantive application to make the order which the Master refused.

As the appeal to the Divisional Court was dismissed upon the merits, no opinion was expressed as to whether such appeal lay.

Hilton, for the plaintiff.

Aylesworth, for the defendant.

CHANCERY DIVISION.

[The Divisional Court, 23rd December, 1889.

In re ROMAN CATHOLIC SEPARATE SCHOOLS.

Schools—Roman Catholic Separate Schools—Public School Act, R. S. O. c. 225.

In answer to questions submitted by the Minister of Education:—

Held, (1) If the assessor is satisfied with the *prima facie* evidence of the statement made by or on behalf of any ratepayer that he is a Roman Catholic, and thereupon (seeking and having no further information) places such person upon the assessment roll as a Separate School supporter, this ratepayer, though he may not by himself or his agent give notice in writing pursuant to s. 40 of the Separate Schools Act, R. S. O. c. 227, may be entitled to exemption from the payment of rates for Public School purposes, he being in the case supposed assessed as a supporter of Roman Catholic Separate Schools.

(2) The Court of Revision has jurisdiction on application of the person assessed or of any municipal elector (or ratepayer, as in the Separate Schools Act, s. 48 (3), c. 227, R. S. O.) to hear and determine complaints:—

(*a*) In regard to the religion of the person placed on the roll as Protestant or Roman Catholic, and

(*b*) As to whether such person is or is not a supporter of Public or Separate Schools within the meaning of the provisions of law in that behalf, and

(*c*) Which appears to be involved in (*b*), whether such person has been placed in the wrong column of the assessment roll for the purposes of the school tax.

It is also competent for the Court of Revision to determine whether the name of any person wrongfully omitted from the proper column of the assessment roll should be inserted therein upon the complaint of the person himself or of any elector (or ratepayer).

(3) The assessor is not bound to accept the statement of or made on behalf of any ratepayer under R. S. O. c. 225, s. 120 (2), in case he is made aware or ascertains before completing his roll

that such a ratepayer is not a Roman Catholic or has not given the notice required by s. 40 of the Separate Schools Act, or is for any reason not entitled to exemption from Public School rates.

(4*a*) A ratepayer not a Roman Catholic being wrongfully assessed as a Roman Catholic and supporter of Separate Schools, who through inadvertence or other causes does not appeal therefrom, is not estopped (nor are other ratepayers) from claiming with reference to the assessment of the following or future year, that he is not a Roman Catholic.

(4*b*) A ratepayer being a Roman Catholic and appearing in the assessment roll as a Roman Catholic and supporter of Separate Schools, who has not given the notice in writing of being such supporter mentioned in s. 40 of the Separate Schools Act is not (nor are the other ratepayers) estopped from claiming in the following or future year that he should not be placed as a supporter of Separate Schools with reference to the assessment of such year, although he has not given notice of withdrawal mentioned in s. 47 of the Separate Schools Act.

Moss, Q.C., for the Attorney-General.

D. A. O'Sullivan, contra.

[ROBERTSON, J., 21ST DECEMBER, 1889.

In re IRON, CLAY, ETC., PAVING COMPANY.

Company—Director—Purchase by director of property of company sold under mortgage—Liability to account—Winding-up—Constitutional law.

One Turner, a director of the company, purchased property of the company in 1888, at a sale by mortgagees of the property, for a sum of $8,400, and in 1889 he obtained $28,000 for the same property. In winding-up proceedings of the company under the Dominion Winding-Up Act, the liquidator claimed that Turner could not as director purchase for his own benefit but that he held the land as a trustee for the company.

Held, affirming the decision of the Master in Ordinary, 9 Occ. N. 461, that this contention was correct, and that Turner was liable and accountable for whatever profit he might have received on a sale by him of the lands, and that by reason of his refusing to pay over or to account for such profits he had become properly adjudged guilty of a breach of trust within the meaning of s. 83 of the Dominion Winding-Up Act.

Held, also, that the Ontario Winding-Up Acts do not apply when the application for winding-up is made by a creditor on the ground of insolvency, because the local Legislature has no jurisdiction in matters of insolvency.

W. Cassels, Q.C., and *D. McDonald*, for Turner.

C. Robinson, Q.C., and *Levesconte*, for the liquidator.

[28TH JANUARY, 1890.

In re GIBSON.

Bond—Solicitors for committee of lunatic as sureties.

The rule that the solicitor for a party will not be accepted by the court as a bondsman for such party is still in force.

The rule was applied to the case of the committee of the person and estate of a lunatic giving a bond for the due performance of her duties as such committee and offering her two solicitors as sureties.

E. T. Malone, for the Inspector of Prisons and Public Charities.

Hoyles, for the committee.

IN CHAMBERS.

[ARMOUR, C. J., 10TH JANUARY, 1890.

MELBOURNE v. CITY OF TORONTO.

Costs—Defendants severing—Partnership—Dissolution before action.

In an action against a municipal corporation for injury to a drain, the corporation caused the two contractors who had constructed the drain and the assignee of one of them to be made defendants. The two contractors were partners at the time of the construction of the drain but had dissolved partnership before the action was begun. One partner appeared and defended by one solicitor and the other and his assignee by another solicitor. Judgment was given dismissing the claim of the corporation against the added defendants with costs, but they were not by the judgment limited to one set of costs.

Held, that there was no "law of the Court" which under the circumstances of this case justified the taxing officer in refusing to allow more than one set of costs to the added defendants.

Rule 1202 considered.

C. R. W. Biggar, for the defendants the city of Toronto.

C. Millar, for the defendants Rose and Townsend.

[FERGUSON, J., 10TH FEBRUARY, 1890.

LEACH v. GRAND TRUNK R. W. CO.

Discovery—Examination of officer of railway company—Engine-driver.

Held, following *Knight* v. *Grand Trunk R. W. Co.*, *post* p. 68, that a servant of the defendant company who was driving a detached engine of the company when it knocked down and killed the man for whose death the action was brought, was not an officer of the company examinable for discovery under Rule 487.

J. W. McCullough, for the plaintiff.

Aylesworth, for the defendants.

[ROBERTSON, J., 3RD FEBRUARY, 1890.

MONK v. BENJAMIN.

Parties—Mortgage action for foreclosure—Wife of assignee of mortgagor—Costs—Appeal from taxation—Amount involved.

The wife of a person to whom the mortgagor conveys his equity of redemption is not a proper party to an action by the mortgagee for foreclosure.

Semble, if such person died after judgment but before final order of foreclosure, his widow would have a right to redeem and might be made a party.

An appeal from taxation of costs was entertained in Chambers where the amount involved was only $5.82, for the reason that a question of principle was raised.

J. C. Hamilton, for the plaintiff.

R. A. Dickson, for the defendants.

[MacMahon, J., 6th January, 1890.

MACDONELL v. BAIRD.

Costs—Judgment by consent referring to arbitration—Omission to provide for costs—Powers of arbitrator—Rule 550—Amendment of judgment.

In an action on a bill of costs the parties consented that judgment should be entered for a certain sum "subject to the award" of a named person. When the action came on for trial this consent was filed, and the trial Judge indorsed the record "I order that judgment be entered for the plaintiff for the sum of, etc., subject to the consent filed herein." Nothing was said about costs, and they were not provided for in any way. The arbitrator or referee made his report or award finding that the amount of the judgment should be reduced to a named sum, and adding "I do award to the plaintiff the costs of this action, including the costs of the reference and award." Judgment was entered in accordance with this award.

Rule 550 provides that "The Court will not refer to arbitration."

Held, that this Rule does not prevent any arrangement for the settlement of an action entered into and acted upon by litigants from being sanctioned and enforced by the Court; and therefore there was power to make a reference by consent in this way; but it was a reference to arbitration and not a reference under the Judicature Act, and the referee had no power to deal with the costs.

The award of costs was stricken out of the judgment and an application afterwards made to the trial Judge to amend the indorsement on the record so as to provide for the costs was refused, although the omission to provide for costs was not intentional.

Masten, for the plaintiff.

W. H. Blake, for the defendant.

[30th January, 1890.

KNIGHT v. GRAND TRUNK R. W. CO.

Discovery—Examination of officers of railway company.

Held, That a track-foreman, a switch-foreman, and two engine-drivers in the employment of the defendants' company were not

officers of the company examinable for discovery under Rule 487, in an action for damages arising out of a railway accident.

Walter Read, for the plaintiff.

Douglas Armour, for the defendants.

[THE MASTER IN CHAMBERS, 30TH JANUARY, 1890.

HENEY v. KERR.

Mortgage—Foreclosure after abortive sale—Period of redemption.

Motion by plaintiff for a final order of foreclosure after an abortive sale, in a mortgage action.

The judgment was originally for foreclosure, but a subsequent incumbrancer paid $80 into Court and had it changed to sale. The sale took place after the usual six months, but proved abortive.

The question raised upon this motion was, what further period should be allowed for redemption.

Middleton, for the plaintiff.

C. Millar, for the subsequent incumbrancer.

The MASTER IN CHAMBERS fixed the further period for redemption at one month.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

GRAHAM v. HARRISON.

Foreign interlocutory judgment—Action on—Evidence of, by exemplification and office copy.

The decision of TAYLOR, C.J., noted 9 Occ. N. 388, was affirmed with costs.

In re SCOTT AND THE RAILWAY COMMISSIONER.

Railways—Expropriation—Lands injuriously affected—Danger to children—Retroactive statute—Appeal from award—Parties.

The decision of DUBUC, J., noted 9 Occ. N. 316, was affirmed with costs.

MORRISON v. CITY OF LONDON FIRE INSURANCE CO.

Insurance—Fire—Carpenter's risk—Repugnant condition—Proofs of loss—Condition precedent—Construction of relative words.

Declaration upon a policy of fire insurance, which recited that the plaintiff had paid the sum of $106 and also the additional sum of $2.25 for insuring against loss by fire, and especially any loss arising from carpenters, etc., being employed upon the premises. Another count was upon an interim receipt, which recited an application for insurance against loss by fire and especially any loss arising from carpenters, etc., being employed upon the premises, and payment of the $106 and also the additional sum of $2.25 with a provision upon the issuing of the policy for cancellation of the receipt. Both the policy and the receipt were alleged to be subject to a condition that the company would not be answerable for loss by fire in or of any buildings under construction wherein carpenters were employed unless the special consent of the company in writing was first obtained and indorsed upon the policy.

To these counts the defendants pleaded (7th plea) that after making the policy and before loss, and also (18th plea) after the granting of the receipt and before loss, the plaintiff had employed in the building carpenters, etc., without having obtained and having indorsed on the policy the consent in writing of the defendants.

Held, 1, That the condition as to the employment of carpenters was not repugnant to the contract and did not itself constitute a consent of the company as stipulated for by the condition.

2. That the pleas were bad because they did not allege the employment of the carpenters at the time of the occurrence of the fire.

A policy was subject to the following condition: Persons sustaining any loss or damage by fire are forthwith to give notice thereof in writing at . . . and are within fourteen days after the loss to deliver in writing, in duplicate, a particular statement and account of their loss, . . . the assured's title or interest therein, and the names and residences of all other parties (if any) interested therein. . . . whether any other insurance, . . . also stating in what manner . . . the building insured . . . was occupied at the time of the loss . . . and when and

how the fire originated as far as the assured may know or believe; and the assured shall verify such statement . . . and until such accounts, declaration, testimony, vouchers, and evidence as aforesaid are produced and examined (if required), and such explanations given, no money shall be payable by the company under the policy. . . . and if the claim shall not for the space of three months after the occurrence of the fire be in all respects verified in manner aforesaid, the assured shall forfeit every right to restitution or payment by virtue of this policy, and time shall be of the essence of the contract.

Held, that the delivery of the statement and account within the fourteen days was a condition precedent to the assured's right to recover.

2. That the words in the condition "as far as the assured may know" related to "when and how the fire orginated," and not to all the preceding requirements of the condition.

COOK v. THOMAS.

Warranty—Action on, previous to payment of purchase money—Measure of damages—Misjoinder of plaintiffs.

Action upon a warranty given on sale of second hand machinery "good for twelve months with proper care." The action was brought in the name of two persons, to one only of whom the warranty had been given.

Held, that no objection to the frame of the suit having been taken at the trial, the Court in term had power to give judgment for the proper plaintiff.

2. That damages could be recovered for a breach of the warranty, notwithstanding that the purchase money had not been paid, promissory notes having been given for the amount. *Church* v. *Abell*, 1 S. C. R. 442, distinguished.

3. That the measure of damages was the sum which at the time of the sale it would have been necessary to expend in order to remove any defect which constituted a breach of the warranty.

HORRICE v. BAIRD.

Real Property Act—Appeal—Affidavits—Documentary Evidence Act—Deed of municipality—Absence of witness—New trial.

An appeal will lie from a verdict rendered upon the trial of an issue under the provision of the Real Property Act, 1889.

2. Upon such an appeal affidavits cannot be read, unless they are mentioned in the notice of appeal, or of the intention to read which notice has been given more than two days before the argument of the motion, unless satisfactory reasons are assigned why an earlier notice was not given.

3. A conveyance executed by a municipality is not a public document within the meaning of the Documentary Evidence Act, 8 & 9 V. c. 113, s. 1.

4. The sufficiency of certain oral testimony in proof of corporate seal discussed.

5. A party who finds himself at the trial without some important witness should ask for an adjournment instead of proceeding with the trial. If he proceeds a new trial will not afterwards be granted.

REX v. STEWART.

Malicious prosecution—No criminal charge laid—Prosecution on advice of counsel or magistrate—Mistake in law or fact—Prosecution with view to compensation.

A child having strayed and come into the house of the plaintiff, the defendant, her guardian, applied for the child but was refused. The defendant then went to a magistrate for "an order for the delivery of the child." The magistrate informed the defendant that he had no power to give such an order, and after consultation with the defendant, issued a summons to the defendant alleging that the plaintiff "did detain one H. B. with intent to deprive the said A. P. S. of possession of the said H. B., contrary to the form of the statute, etc." The plaintiff was committed for trial, indicted, and acquitted.

After verdict for the plaintiff in an action for malicious prosecution and upon a motion for non-suit or new trial :—

Held, BAIN, J., *dubitante*, 1. That the action lay, although no criminal charge had been sufficiently alleged in the information.

2. If a party lay all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel, he is not liable to an action.

3. Advising with a magistrate is a circumstance only for the consideration of the jury in deciding the question of malice.

4. In considering the question of reasonable and probable cause, a defendant may be protected although he was mistaken upon a matter of fact, if his mistaken belief was honest and bona fide; but not upon a matter of law.

5. Proceedings, not with a view to the punishment of an abductor, but by means thereof to regain possession of the child, exhibit a malicious motive.

[TAYLOR, C. J.

TODD v. UNION BANK OF CANADA.

Costs—Retrospective statute.

In an action on contract the plaintiff had a verdict for $101. When the action was commenced the County Court had jurisdiction up to $250, but when the amount claimable exceeded $100 the case could be brought in the Queen's Bench. In such case if the verdict exceeded $200 full costs were given; but if less than $200, and more than $100, costs upon a lower scale were taxed.

Pending the action an Act provided that "in case an action of the proper competence of the County Courts be brought in the Queen's Bench," County Courts costs only should be allowed, and that subject to a set-off of Queen's Bench costs, unless the presiding Judge certified to entitle otherwise.

Held, that the statute applied to the case, although passed after it was commenced.

BUCHANAN v. CAMPBELL.

Security for costs—Interpleader proceedings—Law stamps omitted—Treble stamps

Pending an interpleader summons an order was made for the examination of the claimant upon the affidavit filed by her but not stamped. Thereupon the claimant applied for and obtained an order staying the proceedings until security for costs should be given by the execution creditor, a foreigner. Upon appeal from the County Court, and during the argument, application was made to treble stamp the affidavit.

Held, 1. That no order for security could be made until an issued was directed.

2. Leave to treble stamp should not be given except upon a substantative motion for that purpose, supported by such evidence as will satisfy the Court or Judge that the stamps had been inadvertently omitted.

[BAIN, J.

MERCHANTS' BANK v. GOOD.

Promissory note—Delivery in blank with authority to fill up.

To a declaration upon a note by indorsee against maker, the defendant pleaded that G. & Co., being indebted to McL. & Co., delivered to them a blank note with authority to fill it up with the amount of the indebtedness, payable within two months, and when so filled up, but not otherwise, to deliver it as the note of G. & Co.; and that after payment of the indebtedness, and after more than 15 months, and after revocation of all authority by lapse of time, by the express acts of the parties and by the dissolution of the firm of G. & Co., the said McL. & Co. filled up and delivered the note to the plaintiffs.

Held, upon demurrer, that the plea was bad.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 14TH JANUARY, 1890.

McPHERSON v. WILSON.

County Court appeal—Order in Chambers striking out jury notice—R. S. O. c. 47, s. 42.

The right or claim mentioned in s. 42 of the County Courts Act, R. S. O. c. 47, is that which forms the subject of the action, not the right to take any particular step in the course of the action; and an order made in Chambers in a County Court action striking out a jury notice is not an order finally disposing of a right or claim within the meaning of the section, but is in its nature an interlocutory order, and not appealable.

G. W. Marsh, for the appellant.

Aylesworth, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 7TH FEBRUARY, 1890.

FLATT v. WADDELL.

TOWNSEND v. WADDELL.

Company—Defective incorporation of—Actions by, dismissed with costs—Liability for costs of intending corporators and solicitors—Malice—Want of reasonable and probable cause—Liability upon unpaid shares.

Actions brought in the name of a road company against the present plaintiffs were dismissed with costs on the ground that the company had never been incorporated according to law. The

present actions were brought against four of the corporators of the company, three of them composing the firm of solicitors who had conducted the former actions on behalf of the supposed company, and all four having expressly authorized the bringing of the former actions, seeking to recover the costs of such former actions, execution therefor against the company having been returned *nulla bona*.

Held, that in the absence of malice and of want of reasonable and probable cause in bringing the former actions, the present actions were not maintainable against the defendants as corporators or as solicitors bringing actions on behalf of plaintiffs who had no legal existence.

It was contended by the plaintiffs before the Divisional Court that the defendants were members of a *de facto* corporation in which they held shares that were not fully paid up, and that recovery could be had against them to the extent of the amounts remaining unpaid upon their shares, but no such case was made upon the pleadings or at the trial.

The Court treated this contention as not having been raised, and reserved leave to the plaintiffs to raise it in fresh actions, as they might be advised.

Osler, Q.C., and *F. Fitzgerald*, for the plaintiffs.

Bain, Q.C., and *F. Waddell*, for the defendants.

[12TH FEBRUARY, 1890.

DANAHER v. LITTLE.

Costs—Scale of—Jurisdiction of County Court—Title to land.

The plaintiff by his statement of claim alleged that he was and had been for more than six years the owner of certain land, which was unoccupied, and claimed damages for timber cut by the defendant on such land. The defendant by his statement of defence disputed the plaintiff's claim and set up certain facts by way of confession and avoidance. The action was brought in the High Court; but the plaintiff recovered only $120 damages.

Held, that under the pleadings the plaintiff was obliged to prove his title to the land, and therefore the County Court would have had no jurisdiction, and the costs should be on the scale of the High Court.

J. B. Clarke, for the plaintiff.

Langton, for the defendant.

[ROSE, J., 5TH FEBRUARY, 1890.

MEAD v. TOWNSHIP OF ETOBICOKE.

Indemnity—Question between co-defendants—Order directing determination of—Application for, after judgment—Con. Rule 328.

The plaintiff sued a municipal corporation and a railway company for damages; the corporation in their statement of defence claimed indemnity or relief over against the company, but the company did not answer the pleading, and no order was made or applied for before or at the trial to have the question determined; judgment was given for the plaintiff against the corporation, but not either in favour of or against the company.

After the judgment had been affirmed by a Divisional Court the corporation applied to the trial Judge for an order under Rule 328, to have the question between them and the company determined.

Quære, whether there was power under the Rules to make the order; and

Held, that, if there was power, it would not be a wise exercise of discretion to make it; for new pleadings and a new trial would be necessary, and it would be better that a fresh action should be brought than that the plaintiff should be kept before the Court while the defendants settled their dispute.

McMichael, Q.C., for the defendants the township of Etobicoke.

McCarthy, Q.C., for the defendants the Grand Trunk Railway Company.

CHANCERY DIVISION.

[ROSE, J., 25TH JANUARY, 1890.

GRANT v. CULBARD.

Statutes—General Inspection Act—R. S. C. c. 99, s. 26, construction of—Action against inspector of hides—Pleading—General issue.

Action against a Government inspector of leather and raw hides for fraudulently grading and branding incorrect weights and qualities on hides.

R. S. C. c. 99, s. 26, provides that in any such action the defendant may plead the general issue and that what he did was

"done under this Act . . . and if it appears so to have been done then the judgment shall be for the defendant, etc."

Held, that "done under this Act" means "intended to be done under this Act;" and the defendant not appearing to have acted *mala fide*, or to have intended not to perform his duty under the Act, was entitled to the protection of the above section, though he had not pleaded the general issue in terms, inasmuch as he had in effect stated that what he did was done under the Act.

W. Nesbitt and *R. N. Ball*, for the plaintiff.

G. T. Blackstock and *A. E. Watts*, for the defendant.

[ROBERTSON, J., 8TH FEBRUARY, 1890.

RAYMOND v. LITTLE.

Masters and referees—Reference under s 101 of the Judicature Act—Report—Confirmation—Motion for judgment—Rules 753, 848.

Where the Court at the trial of a partnership action, after declaring that a partnership existed and ordering that it be dissolved and wound up, ordered that all other matters in dispute in the action be referred for inquiry and report to a Master under s. 101 of the Judicature Act:—

Held, that the report of the Master under such reference was not subject to the provisions of Rule 848 as to confirmation by filing and lapse of time, but that any time after it was made, a motion for judgment upon it was in order under Rule 753, and upon such motion the Court could adopt it wholly or in part, and any party dissatisfied with it might before or on the return of the motion for judgment move to set it aside or vary it.

W. H. Blake, for the plaintiff.

Langton, for the defendant.

[FALCONBRIDGE, J., 20TH JANUARY, 1890.

LEESON v. LICENSE COMMISSIONERS OF DUFFERIN.

License commissioners—Liquor License Act—R. S. O. c. 194, s. 11.

Held, that R. S. O. c. 194, s. 11, s-s. 18, applies only to the case of the Board of License Commissioners hearing and dis-

posing of formal objections to the granting of a license, and not to every decision of the board having reference to the granting or refusing of licenses.

Bigelow, Q.C., and *Hughson*, for the plaintiff.

Delamere, Q.C., and *F. Meyers*, for the defendant.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 28TH NOVEMBER, 1889.

REGINA v. FERRIS.

Canada Temperance Act—Summary conviction—Costs of conveying to gaol.

A summary conviction for a breach of the second part of the Canada Temperance Act imposed a fine of $100 and directed distress on non-payment of the fine and, in default of sufficient distress, imprisonment in the common gaol for two months, unless the fine and costs, including the costs of commitment and conveying to gaol, were sooner paid.

Held, that there was no power under the Act to include the costs of commitment and conveying to gaol; and the conviction was therefore bad and must be quashed.

Regina v. *Tucker*, 16 O. R. 127, and *Regina* v. *Good*, 17 O. R. 725, followed.

MacKenzie, Q.C., for the defendant.

Delamere, for the complainant.

[21ST DECEMBER, 1889.

REGINA v. FREEMAN.

Gaming—Selling property by lot or chance—R. S. C. c. 159, s. 2—Summary conviction, form of—R. S. C. c. 178, s. 87.

R. S. C. c. 159, s. 2, prohibits the sale of "any lot, card, or ticket, or other means or device for . . . selling or otherwise disposing of any property, real or personal, by lots, tickets, or any mode of chance whatsoever."

The complainant went to the defendant's place of business, and having been told by the defendant that in certain spaces on two shelves there were cans of tea containing a gold watch, a diamond ring, $20 in money, etc., he paid $1 and received a can

At the argument of a motion to make absolute a rule *nisi* to quash a summary conviction the Court was composed of two of the Judges of the Common Pleas Division; the third being absent attending to other pressing judicial work.

Held, that the Court was properly constituted to dispose of the motion.

A. H. Marsh, for the defendant.

Delamere, for the magistrate.

[THE DIVISIONAL COURT.

LIPSETT v. PERDUE.

Infant—Lease by, for benefit of—Avoidance of—Costs—Order for payment of, by infant.

A person cannot during infancy avoid a lease made by himself reserving rent for his own benefit.

Hartshorn v. *Early*, 19 C. P. 139, and *Slater* v. *Brady*, 14 Ir. C. L. R. 61, 342, followed.

Held, also, that the discretion given by Rule 1170 as to costs authorized the imposition upon an infant of the costs of an action for possession of the lands, brought against him by the persons to whom he made a lease.

Lash, Q.C., for the plaintiffs.

Moss, Q.C., for the defendant.

PAYNE v. MARSHALL.

Gift inter vivos—Sufficiency of.

The defendant, having in her possession a large sum of money which her husband had given her, went with him to a bank to deposit it, and was about to do so when a question arose as to the power of withdrawing it in case of the wife's illness; at the bank agent's suggestion the money was deposited in both their names subject to withdrawal by either of them, and it remained on deposit uninterfered with by the husband at the time of his death, which occurred some months after.

Held, that it was a good gift *inter vivos* to the wife.

Ball, Q.C., for the plaintiff.

G. T. Blackstock, for the defendant.

DOAN v. MICHIGAN CENTRAL R. W. CO.

Pleading—Defence of "not guilty" by statute—Manner of pleading—Rule 418—Contributory negligence, how pleaded.

In an action against a railway company for damages sustained by the plaintiff by the death of his father, by reason, as alleged, of the defendants' negligence in omitting to give the necessary warnings of the approach of their train at a railway crossing, the defendants pleaded "not guilty" and referred to the statutes incorporating the company and to the C. S. C. c. 66, ss. 1 to 88 inclusive, and s. 131.

Held, that the defence was not a compliance with Rule 418; and also that the defence of contributory negligence could not be set up under it, but must be specially pleaded.

G. 1. Blackstock and *Crothers*, for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

[GALT, C.J., 26TH OCTOBER, 1889.

DAWSON v. TOWN OF SAULT STE. MARIE.

High schools—Incorporated town in judicial district—Right to appoint high school board and erect school—Necessity of appointment by by-law—Sufficiency of—Proof of ownership of land—Appropriation of money.

On motion to continue an interim injunction to restrain the corporation of S., in the judicial district of Algoma, from paying over to the high school board of the town and the board from receiving the sum of $15,000 raised by by-law of the town for acquiring a site and erecting a high school theron :—

Held, that under the provisions of ss. 4 and 10 of R. S. O. c. 226, taken in connection with s. 1 of 50 V. c. 64 incorporating the town, the corporation were authorized to appoint a high school board therefor and to pass the by-law for the erection of the said school; and that the consent of the Lieutenant-Governor, provided for by s. 8, was not required, as this was not an additional high school.

Held, also, that the appointment of the board must be by-law, but a by-law therefor passed after the motion was made but before the hearing thereof was sufficient.

The Court refused to entertain an objection that the board were about to build the school on land acquired by them; for it

would not be assumed that the money would be spent until the title to the land had been acquired; and also, it was not necessary to shew that specific portions of the $15,000 had been appropriated to the purchase of the land and the erection of the building.

Shepley, for the plaintiff.
Masten and *W. M. Douglas*, for the defendants.

[ARMOUR, C.J., 24TH DECEMBER, 1889.

MAXWELL v. SCARFE.

Creditors' Relief Act—"Forthwith," meaning of in s. 4—Entry by sheriff of moneys received under execution.

Held, that the word "forthwith" contained in s. 4 of the Creditors' Relief Act, R. S. O. c. 65, with reference to the entry of moneys levied under execution, having regard to the circumstances under which it is used, and the purposes and provisions of the statute, and the abuses which a different construction would give rise to, must receive a strict construction, and means "without any delay"; but even if it should receive a free construction and be equivalent to "within a reasonable time," the sheriff did not in this case make the entry within such time.

John Crerar, for the plaintiff.
Heyd, for the defendant.

[ROSE, J., 16TH NOVEMBER, 1889.

CAMERON v. CUSACK.

Sale to defeat creditors—Setting aside—Claim for seduction—Evidence—Exemplification of judgment.

C., knowing that a claim was to be made against him by W. C. for the seduction of his daughter, some six days before the writ issued therefor arranged with his brother, who was aware of all the facts, to sell out to him his estate, receiving for himself $150, and to apply the balance in payment of his liabilities, but the intention was not to acknowledge or treat W. C.'s claim as a liability. W. C. proceeded with his action and recovered judgment.

Held, that W. C. was a creditor within the meaning of the statute; and the sale, having been made with intent to defeat W. C.'s claim, must be set aside.

Barling v. *Bishopp*, 29 Beav. 417, followed.

Ex p. Mercer, 17 Q. B. D. 290, distinguished.

After the evidence had been taken the trial Judge reserved his decision and permitted written arguments to be put in, in which there was an objection that an exemplification of the judgment in the seduction action was no evidence in this action. The daughter was present in Court and could have proved the cause of action.

The trial Judge was of opinion that the objection was too late, but, to prevent the question hereafter arising, gave leave to put in the evidence, the giving of judgment being in the meantime suspended.

Glenn, for the plaintiff.

C. McDougall, Q.C., for the defendant.

[MACMAHON, J., 21ST DECEMBER, 1889.

WALTON v. HENRY.

Injunction—Concealment of fact—Dissolving—Damages—Debt—50 V. c. 23, s. 3 (O.)—O. J. Act—Counter-claim—Set-off—Costs.

The defendant having distrained for rent in arrear, the plaintiff claimed that the defendant was indebted to him in damages for breach of the covenants of the lease, and obtained *ex parte* an interim injunction restraining proceedings under the distress.

On its being shewn that in the statements made on which the injunction was granted, there was, if not misrepresentation, at least a concealment of an important fact as regards the alleged breach of one of the covenants, the injunction was dissolved with costs.

Semble, the injunction should not have been granted, as the plaintiff had a complete remedy in damages.

Semble, also, that the damages claimed by the plaintiff were not a "debt" within s. 3 of 50 V. c. 23 (O.) so as to constitute a set-off against the rent; and although under the Ontario Judicature Act they might possibly be the subject of counter-

claim, they would not justify an injunction as against a distress levied, as here.

The direction that the injunction was dissolved with costs, meant costs payable at the time.

Gordon Hunter, for the plaintiff.

E. D. Armour, for the defendant.

[14TH DECEMBER, 1889.

STONEHOUSE v. LOVELACE.

Statute of Limitations—Adverse possession of land—Sufficiency of.

Under a verbal agreement made in 1871 between the plaintiff and his father, the owner of a farm, the plaintiff was to enter into possession, work, and treat the same as his own, the father promising to devise it to him by his will. The plaintiff in pursuance of the agreement entered into and continued in possession up to 1884, expending, as he said, a large sum of money in improvements and paying the taxes. The evidence, however, shewed that the father never intended relinquishing his title to the land during his lifetime, his actions being such as to indicate that he deemed himself still the owner, namely, by mortgaging it, leasing it, etc., his intention being that the plaintiff should only own it when he received it as devisee under his will; and the father having by his will devised the land to the plaintiff, the plaintiff accepted thereunder.

Held, that the plaintiff had not held by such adverse possession as enabled him to claim that his possession had ripened into a title.

Keffer v. *Keffer*, 27 C. P. 257, distinguished.

Fullerton, for the plaintiff.

Watson, for the defendant.

[STREET, J., 3RD MAY, 1889.

CAMERON v. ROWELL.

Will—Estate—Meaning of—Real or personal estate—Limitation of actions—Express trustee.

The word "estate" used in a will, even when associated with words relating to personal property, is sufficient to pass real

estate, unless from other parts of the will or from the way the word is used in the particular part of the will, or in some other way, it is clearly shewn that it is intended to be restricted to personal estate.

J.E.D. under the will of his mother became entitled on attaining his majority in 1878, to a legacy of one-half the unexpended estate comprised in the will. In 1877 he assigned all the interest therein, both real and personal, to J.C. and the latter's interest became vested in G.C.

Held, that under the terms of the will the word "estate," being entirely applicable to personal estate and inapplicable to real estate, only applied to the former, and therefore G. C.'s claim under J.E.D. was limited to the personal estate, and as to this he had no claim either, for as J.E.D.'s legacy was payable in 1878, and it appeared that no payment was then made, nor any acknowledgment since of any right thereto, nor had the fund been set apart for J. E. D. so as to constitute the executor an express trustee for him, the claim was barred by the statute.

A. W. Aytoun-Finlay, for the plaintiff.

Beard, Q.C., for the defendant.

IN CHAMBERS.

[BOYD, C., 17TH FEBRUARY, 1890.

In re HILL, HAWSE v. HAWSE.

Administration order—Summary application for, under Rule 965—Infant applicant.

Application by one of the next of kin of John Hill, deceased, under Rule 965 for an order for the administration of the estate of the deceased. The applicant was an infant, moving by her next friend.

The application came before BOYD, C., in Chambers on the 17th February, 1890.

Masten, for the defendant, objected to the status of the infant plaintiff to maintain the application, citing *Brown* v. *Brown*, 9 P. R. 245.

C. J. Holman, for the applicant, referred to the language of Rule 965.—"Any person claiming . . . may apply to the Court or a judge upon motion . . . for an order for the administration of the estate, real or personal, of such deceased

person;" and to the language of Rule 989.—"Any adult person," under which latter Rule, or its equivalent Chy. G. O. 640, providing for summary applications for partition, *Brown* v. *Brown* was decided; and also referred to *Re Wilson, Lloyd* v. *Tichborne*, 9 P. R. 89.

BOYD, C., held that the application was properly made on behalf of an infant as one of the next of kin.

[FERGUSON, J., 10TH FEBRUARY, 1890.

In re MURRAY.

Infants—Service on official guardian—Quieting Titles Act.

In a proceeding by petition under the Quieting Titles Act service on the official guardian is good service upon infants who are required to be notified of the proceedings.

H. D. Gamble, for the petitioner.

[FALCONBRIDGE, J., 18TH FEBRUARY, 1890.

PAYNE v. NEWBERRY.

Costs—Security for—Motion for judgment under Rule 739—Rule 1251.

Since the passing of Rule 1251 the practice sanctioned by *Doer* v. *Rand*, 10 P. R. 165, and *Anglo-American Casings Co.* v. *Rowlin*, ib. 391, is no longer applicable.

And where a plaintiff against whom a præcipe order for security for costs had been obtained, moved to set it aside and for judgment under Rule 739, without paying $50 into Court under Rule 1251, his motion was dismissed.

E. Taylour English, for the plaintiff.

Douglas Armour, for the defendant.

CENTRAL PRESS ASSOCIATION v. AMERICAN PRESS ASSOCIATION.

Discovery—Examination of officer of company—Refusal to attend—Motion to strike out company's defence.

There is no power to strike out the defence of an incorporated company for the refusal of an officer to attend for examination for discovery.

Badgerow v. *Grand Trunk R. W. Co.*, 13 P. R. 132, approved.

McCrimmon, for the plaintiffs.

C. J. Holman, for the defendants.

[MacMahon, J., 18th February, 1890.

GARDNER v. BURGESS.

Dower—Inchoate right of—Equitable estate of husband—Assignment for benefit of creditors.

Certain lands were conveyed to W. B. subject to incumbrances thereon. W. B. then mortgaged the lands, his wife joining to bar dower, and afterwards assigned all his estate to the plaintiff under R. S. O. c. 124. The plaintiff sold the lands to the defendant, and the question arose whether they were sold subject to the inchoate right of dower of the wife of W. B.

Held, that all that W. B. acquired by the conveyance to him was the equity of redemption of his grantor, and his wife would be entitled to dower out of this equitable estate only in the event of her husband dying beneficially entitled, which event could not now happen, W. B. having parted with such estate.

R. S. O. c. 133, s. 1, and *Re Croskery*, 16 O. R. 207, referred to.

Arnoldi, Q.C., for the plaintiff,

R. M. Macdonald, for the defendant.

[The Master in Chambers, 4th February, 1890.

DENHAM v. GOOCH.

Dismissing action—Non-attendance of plaintiff for examination—Unmeritorious action—Security for costs—Former action for same cause by another plaintiff.

Upon a motion to dismiss the action for the plaintiff's non-attendance to be examined for discovery pursuant to appointment, the plaintiff offered to submit herself for examination at any time at her own expense.

The Master in Chambers, nevertheless, dismissed the action with costs, the plaintiff's claim not being in his opinion an honest or fair one.

The plaintiff sued, as lessee from her brother of certain goods, for damages for illegal distress. An action had been previously brought by her brother in respect of the same distress against the same defendant, and had been dismissed.

Semble, that under these circumstances security for costs might be ordered.

A. W. Burk, for the plaintiff.

H. H. Macrae, for the defendant Gooch.

[20TH FEBRUARY, 1890.

KEFFER v. MILLER.

Parties—Mechanics' lien action—Adding owner after ninety days.

This was an action to enforce a mechanic's lien, brought by the lien-holder against one Miller, the person for whom he did the work, who was at that time the owner. The action was brought within the ninety days required by the Act, but subsequently to the registration of a conveyance by Miller of all his interest in the land to one Coxon. After the expiry of the ninety days the plaintiff obtained an *ex parte* order amending the writ of summons by adding Coxon as a defendant. Coxon was then served with the writ of summons and statement of claim, and the facts above stated appeared on the face of the statement of claim.

N. F. Davidson, for Coxon, moved under Con. Rule 536 to set aside the order adding Coxon as a party, or in the alternative under Rule 756 for judgment dismissing the action upon admissions in the statement of claim.

J. W. Curry, for the plaintiff contra.

THE MASTER IN CHAMBERS held on the authority of *Bank of Montreal* v. *Haffner*, 10 A. R. 593, that there was no right of action against Coxon after the expiry of the ninety days; and made an order dismissing the action as against him with costs and vacating the registry of a *lis pendens* as regarded his interest in the lands.

NEW BRUNSWICK.

In the Supreme Court.

[FEBRUARY, 1890.

In re CLEVELAND.

Statute of Distributions—Wife dying intestate leaving personal property—Right of surviving husband to administration and estate.

A married woman died intestate having personal property and leaving her husband surviving, who took out letters of administration, and collected the debts, etc. The next of kin to the wife claimed the estate.

Held, PALMER, J., dissenting, that the husband was entitled to the administration and personal estate of his wife.

Per ALLEN, C.J.—The Statute of Distributions does not apply in a case where a married woman dies intestate, entitled to personal property, leaving a husband surviving; but he is entitled to it *jure mariti;* and his right does not depend on the 17th section of 26 Geo. III. c. 11, which was copied substantially from the 25th section of 29 Car. II. c. 3, which was only passed to remove any doubts that might exist as to a surviving husband being affected by the Statute of Distributions; and, as said by the Lord Chancellor, in *Watt* v. *Watt*, "under the apprehension that his right might be considered to be affected by the statute." It follows from this view of the statute and from the English cases on the subject, that the husband's right to his deceased wife's *choses in action* does not depend upon the 17th section of our first Statute of Distributions, and that the omission of the Legislature to re-enact that section does not affect the right of the husband in this case.

C. N. Skinner, Q.C., and *Pugsley*, for the administrator.

W. W. Wells, for the next of kin.

FREDERICTON AND ST. MARYS RAILWAY BRIDGE COMPANY v. CITY OF FREDERICTON.

Assessment and taxes—Exemption from taxation—Railway bridge company—33 V. c. 46 (N. B.).

This was a special case submitted for the opinion of the Court. The plaintiffs were a corporation created by the Parliament of Canada by 48 & 49 V. c. 26, and had constructed under the provisions of the Act and were the owners of a steel railway bridge across the river St. John between the city of Fredericton and the parish of St. Mary's, wholly within the city of Fredericton, and also owners of necessary approaches on each side of the river to the bridge. They were assessed in the city of Fredericton for the year 1889 in the sum of $1,275, which they refused to pay, claiming exemption on the ground that they were a railway company within the meaning of 33 V. c. 46 (N. B.).

Held, by the full Court, that the plaintiffs were a company within the meaning of s. 2 of 33 V. c. 46, and that the railway bridge, railway rolling stock, station houses, and other property used by the plaintiffs in connection with the railway bridge, were not liable to taxation in the city of Fredericton.

Blair, A.-G., for the plaintiffs.

D. Jordan and *C. W. Beckwith*, for the defendants.

KENNIE v. SMITH.

Warrant of apprehension—Justice of the peace—Omission of statement of information.

S. had been arrested on the following warrant, issued by a justice of the peace :—

"To all or any constables or other peace officers in the county of Albert: Whereas R. S. D. did on the 28th day of April last past enter upon the real property of the A. B. L. & C. Co., whereof T. McH. is manager, situate in the parish of H., in the county aforesaid, and did remain thereon for a long time and did, unlawfully and with intent to defraud, appropriate to his own use or to the use of some other person the real and personal property of the said company so as to deprive the said T. McH. of the advantage, use, and enjoyment of his beneficial interest therein, which the said T. McH. has as manager of the said company and

as a member thereof was entitled to. These are therefore to command you to apprehend the said, etc."

Subsequently S. brought an action for false arrest and imprisonment against K., the constable who had executed the warrant, and recovered a verdict in the Albert County Court. An appeal was then taken to this Court and the question of the validity of the warrant was argued.

Held, that the warrant was bad, inasmuch as it did not state that there was an information and that such information was on oath or before and by whom it was made and taken.

A. I. Trueman, for the appellant.

O'BRIEN v. MILLER.

Notice of action—Fisheries overseer not entitled to—Trespass—Damages.

This was an appeal from the Gloucester County Court. The declaration alleged that the appellant "took and carried away three large cases of smelt of and belonging to the respondent of the value of $54.00." The appellant was fisheries overseer under the Dominion Fisheries Act, at St. John, N.B., where he caused the fish to be seized as being illegally caught with a seine. At the trial a motion for a nonsuit was made on the ground that the appellant, being fisheries overseer, was *ex officio* a justice of the peace and was entitled to notice of action under cc. 89 and 90, C. S. N. B. The motion was refused by the Judge and the jury returned a verdict for the respondent.

Held, that the fisheries overseer was not entitled to notice of action before the suit was commenced.

McLeod, Q.C., for the appellant.

Hanington, Q.C., for the respondent.

NOONAN v. BANK OF BRITISH NORTH AMERICA.

Postponement of trial – Judge's order—Amendment of, when void—Power of Judge—Costs.

This was an appeal from an order made by the Judge of the County Court of Northumberland. The trial of this and of four other causes against the appellant were on his application postponed by an order of the County Court Judge "on the usual terms of paying costs." The orders for postponement were not

drawn up at the time, but were shortly afterwards presented to the Judge for his signature, and on reading them the Judge expressed some misgivings as to whether the terms of the written papers sufficiently expressed the intention of the orders made. These orders did not clearly specify that the costs of opposing the postponement should be paid. After the orders had been signed a compromise was effected between the parties and the four suits settled. The respondent now claimed costs of opposing the postponement, and on application to the Judge, he amended the orders so as to include such costs. These amended orders were now appealed from.

Held, that after the orders had been made the appellant had acted on them by settling the suits with the respondents, and the Judge could not make a second order varying his first.

Geo. F. Gregory, for the appellant.

D. Jordan, for the respondent.

MANITOBA.

In the Queen's Bench.

[THE FULL COURT.

McMONAGLE v. ORTON.

Judgment debtor—Material for application to commit—Appeal—Order other than that asked for—Reinstatement of appeal on list.

Depositions of a debtor taken upon an examination as to his means to satisfy a judgment may be used against him on an application to commit under the Debtors' Act. So also may his cross-examination on an affidavit filed by him in answer to such an application.

The decision of a single Judge upon such an application will not be readily reversed upon appeal.

An order to pay by instalments may be made upon a summons to commit.

Through misapprehension as to the hour at which the Court sat, counsel appeared after his appeal had been struck out.

Held, considering the nature of the order appealed from, that the appeal would be reinstated were there reason to believe that upon full argument the order would prove to be erroneous.

[TAYLOR, C.J.

WATERS v. BELLAMY.

Judgment debtor—Examination of debtor under judgment for costs only—Depositions improperly taken.

A debtor under judgment for costs only cannot be examined as to his means.

A debtor having been examined under such a judgment,

Held, that the depositions could not be read on an application against him under the Debtors' Act.

[KILLAM, J.

VINEBERG v. ANDERSON.

Sale of goods—Authority to buy of person in charge of business.

The defendant was in partnership with Mrs. P. in a business, of which Mr. P. had the management under a power of attorney from both partners, carried on under the name of P. & Co. The defendant himself took no part in the management, further than being sometimes consulted about purchases. Mrs. P. died, and P. was left in charge to take stock and wind up the business, and to obtain a purchaser for it. The firm name remained over the store, and there was no outward change.

While so in charge, P. ordered goods from the plaintiffs in the name of P. & Co. After the goods had been delivered, the defendant took possession of the whole stock, including the goods supplied by the plaintiffs, and eventually sold it. Before the sale the plaintiffs demanded the goods from the defendant, but were refused.

In an action for goods sold and delivered,

Held, that P. had no authority to bind the defendant by the purchase.

If the plaintiffs thought they were selling to the defendant, and the defendant did not purchase, the property would not have passed, and the defendant would have been liable in some form of action, but these facts were not clearly proved.

WESTERN CANADA LOAN CO. v. SNOW.

Pleading—Fraudulent conveyance.

It is not sufficient, in a bill impeaching conveyance as fraudulent against creditors, to allege that it was made for the purpose and intent of defrauding, etc., without alleging the purpose and intent to have been those of the grantor.

In such a bill, the insolvency of the grantor is not shown by alleging (1) that at the time of the making of the deed the grantor was indebted to the plaintiff *and others* in large sums of money, (2) and was not at the time of making said deed, or at any time since, able to pay his creditors *and others*, and (3) was and is in fact insolvent.

Charges of fraud must be precise and definite.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 8TH MARCH, 1890.

HAMILTON v. GROESBECK.

Master and servant—Injury to workman by unguarded saw—Action for negligence—"Moving," meaning of in s. 15 of Factories Act, R. S. O. c. 208—"Defect," meaning of in s. 3 of Workmen's Compensation for Injuries Act, R. S. O. c. 141.

By s. 15 of the Factories Act, R. S. O. c. 208, it is provided that all belting, shafting, gearing, fly-wheels, drums, and other moving parts of the machinery shall be guarded.

Held, that the word "moving" is used in its transitive sense and signifies "propelling," and that no duty is imposed by the section upon owners of saw-mills to guard the saws which are propelled by the moving parts of the machinery.

By s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. c. 141, where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if he had not been engaged in his work.

Held, that the want of a guard to a saw was not a defect within the meaning of this provision.

Such a defect must be an inherent defect, a deficiency in something essential to the proper user of the machine.

And where a workman in a saw-mill was injured by being thrown against an unguarded saw, and it was shewn that a guard would have prevented the injury:—

Held, that an action for negligence was not maintainable against the owners at common law nor by virtue of either of the above mentioned statutes.

Aylesworth, for the plaintiff.

J. S. Fraser, for the defendants.

In re SOLICITOR.

Solicitor and client—Taxation of costs—Place of reference—Agency work done in Toronto—R. S. O. c. 47, s. 32.

Held, affirming the decision of STREET, J., 13 P. R. 276, that a reference for taxation of bills of costs between solicitor and client may properly be directed to one of the taxing officers at Toronto, even where the business charged for in the bills, with the exception of agency work done at Toronto, was all done in an outer county.

The words of s. 32 of the Solicitors Act, R. S. O. c. 47, "any of the business charged for in the bill" include business performed at Toronto by the agent of the principal solicitor.

ARMOUR, C.J., inclined to the contrary opinion, but deferred to that of the other members of the Court.

C. J. Holman, for the solicitor.

Shepley, contra.

[FALCONBRIDGE, J., 28TH FEBRUARY, 1890.

REGINA *ex rel.* TOWNSEND v. FERGUSSON.

Municipal elections—Election of warden by county council—Spoiled ballot.

This was an appeal by the relator (under 52 V. c. 36, s. 46) from an order of the Junior Judge of the County Court of Wentworth upon a relation under the Municipal Act to void the election of Robert Fergusson as warden of the county of Wentworth, and to declare the relator, Thomas B. Townsend, duly elected as warden. After the service of the notice of motion the defendant disclaimed, and the only question was whether the relator should be declared elected. The County Court Judge refused to declare him elected and ordered a new election, and the relator appealed.

The county council was composed of twenty-two members, all of whom were present when the council proceeded to the election of a warden, the clerk presiding.

The following rule of procedure was adopted by the clerk and acquiesced in by the council: "Each candidate will be nominated by a mover and seconder, and then ballotted for, the result of the ballot being announced before another candidate is nomi-

nated. In marking a ballot paper a vote in favour of a candidate is to be denoted by a cross *opposite his name only* * * *"

The ballot papers used each contained the names of all the members of the county council.

On the 16th ballot Mr. Fergusson received eleven votes, and on the 19th Mr. Townsend received eleven votes valid beyond doubt; and there was another given and claimed for him, which was the one in dispute, and which if regularly cast for him would have entitled him to the seat. The clerk however threw it out, thus constituting a tie between Fergusson and Townsend, and by the casting vote of the reeve of Ancaster, the former was declared elected.

The ballot in dispute was marked with a cross which might have been intended to be opposite the name of Townsend, but which was more nearly opposite the name of Stipes, that next above Townsend's.

The appeal was argued on the 25th February, 1890, before FALCONBRIDGE, J., in Court.

R. R. Waddell, for the relator.

Begue, for the defendant.

FALCONBRIDGE, J.—I was at first under a strong impression that the word "only" added no force to the rule of procedure which the clerk promulgated and the council acquiesced in, and that as the ballot was for only one candidate at a time, the fair reading of the rule would be to allow the vote if it was opposite the candidate's name at all. But on consideration I do not see that I have any more right to disregard the word "only" than the word "opposite," and it could not be contended that the ballot could be counted if the cross were opposite the name of some other candidate.

The judgment of the learned Junior Judge is in my opinion correct, for the reasons there assigned.

The Parliamentary election cases have for obvious reasons no application to the present one.

There will be no costs of the appeal. Mr. Fergusson had disclaimed before the hearing by the Judge.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 8TH MARCH, 1890.

BARBER v. McKAY.

Registration of subsequent deed—Priority—Proof of valuable consideration.

Registration of a subsequent deed will not give priority over another deed prior in point of time from the same grantor unless a valuable consideration is proved.

Bain, Q.C., for the defendants.

W. T. Allan, for the plaintiffs.

SHAW v. McCREARY.

Married woman—Separate estate—Liability of wife for husband keeping a wild animal on wife's property—R. S. O. c. 132, s. 14.

The plaintiff was attacked on the public street and injured by a bear, which had escaped from the premises of the defendants (husband and wife) where they resided. The husband had brought the bear home and confined him in a yard without objection on the part of the wife. The premises were the separate property of the wife.

In an action against the defendants, in which a verdict was rendered against the husband alone, the trial Judge having directed the jury that the wife was acting under the dominion of her husband, and consequently was not liable:—

Held, reversing GALT, C.J., that a married woman may be liable for torts committed by her unless acting under the coercion of her husband, which was not proved here, and that R. S. O. c. 132, ss. 8 and 14, gave her all the rights of a *feme sole* in respect of her separate property against all the world, including her husband, and that if she wished to escape the liability which attaches to the keeper of wild animals, her duty was either to have the bear destroyed or to have it sent away; and a new trial was ordered as to the wife, unless a consent should be given to allow the verdict to include both defendants.

R. L. Fraser, for the plaintiffs.

W. N. Miller, Q.C., for the defendant Mary McCreary.

[BOYD, C., 20TH FEBRUARY, 1890.

In re CENTRAL BANK.

HOGG'S CASE.

Winding-up proceedings—Infant stockholder repudiating liability as contributory—Laches—Acquiescence.

H. signed the petitioner's (his infant daughter's) name to a stock subscription book of a bank, paid the calls, and received the dividend cheques, which were indorsed by the daughter at her father's request. The bank was put into liquidation by winding-up proceedings and the order for call against contributories was made on 31st October, 1888. The petitioner came of age on the 31st January, 1889, and took proceedings to have her name removed from the list on the 30th October, 1889.

Held, that there was no authority to justify fixing her with liability, and she was discharged as a contributory.

Hoyles, Q.C., for the petitioner.

Hilton, contra.

[FERGUSON, J., 11TH FEBURARY, 1890.

LINCOLN PAPER MILLS CO. v. ST. CATHARINES & N. C. R. COMPANY.

Railways and railway companies—Default in payment of compensation moneys—Rights of land-owner—Vendor's lien—Injunction—Order for possession.

Held, that where a railway company had failed to pay the compensation awarded to land-owners in accordance with a judgment obtained for the same, although the railway company had, pursuant to order of the Court, entered into possession of the lands and were operating their railway over them, the land-owners were entitled to an order declaring them to have a vendor's lien on on the land for the amount, with such provisions as were necessary to realize by means of a sale, but they were not entitled to an injunction restraining the railway company from operating their railway on the lands, nor to an order for the delivery of possession.

McClive, for the plaintiffs.

Aylesworth, for the defendants.

[ROBERTSON, J., 8TH FEBRUARY, 1890.

In re BUSH.

Executor and trustee—Removal of—Trustee Act, 1850—Petition, entitling of.

Where anything remains to be done under a will appointing an executor which comes within the province of the executorship, there is no authority to remove him from office as executor and trustee and to appoint another in his place.

In re Moore, McAlpine v. *Moore*, 21 Ch. D. 778, distinguished.

A petition to remove a trustee should be entitled, "In the matter of the Trustee Act of 1850."

J. M. Clark, for the petitioner.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 21ST DECEMBER, 1889.

WATT *v.* CLARK.

Malicious prosecution—Termination of criminal proceedings in favour of accused—Evidence of—Right of defendant to prove plaintiff guilty of the criminal charge laid.

In an action for malicious prosecution the claim was that the defendant did on the 8th December charge the plaintiff with having on two or three occasions committed wilful perjury. The magistrate reserved his decision at the time, but on the defendant preferring further charges of a similar character, the magistrate upon these and the former charges committed the plaintiff. When the matter came before the grand jury at the assizes the prosecutor caused four charges to be laid against the plaintiff, which included the charges laid on the 8th December, and which the grand jury ignored.

Held, that it sufficiently appeared that there was a termination of the prosecution in the plaintiff's favour.

The Judge at the trial of this action ruled that the defendant could not produce evidence to contradict the plaintiff on his statement as to the perjury having been committed.

Held, that the ruling without qualification was too broad; for though a defendant in an action of malicious prosecution is not bound to prove the plaintiff's guilt as charged in the criminal proceedings, still he is at liberty to do so if it be necessary to

establish reasonable and probable cause; but as it appeared that notwithstanding the ruling the defendant was not precluded from adducing such evidence, the ruling was of no importance.

Pegley, for the plaintiff.

The defendant in person.

HAMILTON v. MASSIE.

Malicious arrest—Indictment for conveying tobacco to convict in Central prison—Rules relating to prison creating indictable offence—Authority to make—Section of Act imposing penalty, indictment under—R. S. O. c. 238, ss. 6, 28—Handcuffing, when justifiable—Trespass.

Under the authority conferred by s. 6 of R. S. O. c. 238, on the inspector of prisons to "make rules and regulations for the management, discipline, and police of the Central prison, and for fixing and prescribing the duties and conduct of the warden and every other officer or servant employed therein," a rule was made providing, amongst other things, (Rule 201) that any officer or employee who should knowingly bring or attempt to bring in to any prisoner any tobacco, should be at once dismissed and criminally prosecuted; and (Rule 219) that employees of contractors must strictly conform to all rules and regulations laid down for the guidance of guards or employees of the prison, and any infraction of such rules and regulations by such employees will be promptly dealt with. By s. 28 of the Act, any person giving any tobacco to any convict (except under the rules of the institution) or conveying the same to any convict, shall forfeit and pay the sum of $40 to the warden, to be by him recovered for the use of the prison in any Court of competent jurisdiction.

The plaintiff, a workman in the Central prison in the employment of B., a contractor therein, was detected conveying tobacco to a convict, whereupon M., the warden, directed McG., a constable, to arrest him, which he did, and, though under no apprehension of the plaintiff making any attempt to escape, handcuffed him and led him through the public streets of Toronto to the police station. On the charge preferred the plaintiff was indicted.

In an action for malicious arrest and trespass:—

Held, that plaintiff was subject to an indictment and therefor the arrest was legal.

Per GALT, C.J., and ROSE, J.—Under s. 6 authority was conferred to make the rules, and for disobedience thereof the plaintiff was subject to indictment, the remedy not being limited to that prescribed by s. 28.

But *per* ROSE, J.—In view of the opinion of MacMahon, J., as to the effect of s. 28, that question was not of much importance, the result being the same whether indicted under the rule or statute.

Per MACMAHON, J.—The power conferred by s. 6 is limited to the objects therein expressed, and does not authorize the making of a rule to conflict with s. 28, or which would cause an offence to be created indictable at common law; but that the plaintiff was, by virtue of s. 25 of R. S. C. c. 173, subject to indictment under s. 28, the remedy thereunder not being limited to the recovery of the penalty.

Held, however, that, under the circumstances the handcuffing was not justifiable and the defendant McG. was liable in trespass therefor; but no liability therefor attached to M., as the evidence failed to show that he was any party to it.

J. A. McGillivray, for the plaintiff.

Bigelow, for the defendants.

MASON v. SOUTH NORFOLK R. W. CO.

Agreement for sale of land—Obstruction to land by railway company—Rights of vendor and purchaser as to damages.

The plaintiff was in possession of certain land under an oral agreement of purchase at $450 payable in bricks deliverable as demanded, of which $100 worth had been demanded and delivered. The defendants, without making any compensation therefor, built their railway in front of the land so as to interfere with the plaintiff's right of access, whereupon this action was brought and damages recovered by the plaintiff, he being treated as entitled to the whole estate in the land and the injury as permanently reducing the value of the land.

Held, that the company were trespassers and could not justify the acts complained of under the statute; that the trespass was a continuing one, and fresh damages accrued and a new right of action arose every day; that substantial damages were recoverable for the disturbance of the possession; but in a first action only nominal damages for the injury to the reversion; though if

the obstruction was continued thereafter, vindictive damages might be recovered to compel the removal of same; that if the defendant desired to prevent the bringing of fresh actions the matter should be put in train for assessment of damages.

Held, therefore, that the damages here were not properly assessed; and a new trial was directed.

Semble, that the damages for injury to the reversion belonged to the vendor, and leave was given to add him as a party plaintiff.

F. D. Armour, for the plaintiff.

Robb, for the defendants.

[FERGUSON, J., 12TH OCTOBER, 1889.

TRUSTEES OF SCHOOL SECTION 24 OF TOWNSHIP OF BURFORD v. TOWNSHIP OF BURFORD.

Public schools—Formation of school sections—Map of—Evidence of—Land belonging to one school section assessed to another section—Rolls finally passed—Claim for moneys paid out of municipal loan fund.

As evidence of the formation of school sections in a township by the municipal council thereof, a rough sketch or map designated "school section map township of B.," but without signature, seal, or date, was produced from the proper custody, and had the appearance of being very old, and there was no other map to be found. In 1888, before this action was commenced, which was in 1889, but after the commencement of the agitation which gave rise thereto, the municipal council passed a by-law "to make alterations in school section map," and authorized the clerk to correct said school section map, etc., and when any difficulty arose as to boundaries of school sections recourse was had, at least in some instances, to this map.

Held, that this map must be assumed to be drawn in pursuance of the statute, and therefore afforded evidence of the original division of the township into school sections by the township council.

School section 24 complained that for the years 1883 to 1887 certain lots which formed part of that section had not been assessed therefor, but had been assessed as part of school section 23, and the taxes thereon levied and paid over to section 23, and that section 24 was entitled to be paid these taxes either by the township or by section 23. In each of these years, so far as

regards these matters, the rolls were finally passed by the Court of Revision and certified by the clerk, etc.

Held, that school section 24 could not now maintain such claim, for they were bound by s. 87 of R. S. O. c. 180, under which the rolls as finally passed by the Court of Revision, etc., were valid and binding on "all parties concerned," school section 24 coming within that designation; but apparently they were not entitled to the notice provided for by s. 41.

School section 24 also claimed that by reason of certain lots claimed to belong to that section being assessed as part of school section 23, section 24 did not get its proper share of the interest of the money paid the township to equalize townships that had not borrowed from the municipal loan fund, which was distributed according to the population of the school sections.

The contention of section 24 being to a great extent erroneous, and the amount which they might be entitled to infinitesimally small, and the amount having been distributed in good faith, the Court refused to interfere.

J. W. Bowlby, for the plaintiffs.

Harley, for the township of Burford.

A. J. Wilkes, for school section 23.

[MacMahon, J., 11th December, 1889.

BROWN v. DAVY.

Donatio mortis causa—Gift inter vivos—Evidence of—Board, nursing, and attendance on parent—Right to recover for.

J. W., who was afflicted with cancer in the face and neck, in September went to the house of a married daughter, the defendant, at the city of K., and was tended and nursed by her and another daughter. In September he was joined by his wife, who remained with him until his death, which took place in January following. When he had been at the defendant's house nearly three months, another daughter asked him to give the defendant the price of a piano, when he said he would not do that, but, pointing to a box in which he kept some money and promissory notes, and which he kept locked retaining the key, said it was the defendant's to do what she liked with; but it appeared he had reference merely to satisfying defendant for her care and attention, saying that was sufficient for all. No change was

made in the possession of the box and its contents, the same continuing in J. W. up to the time of his death, and he taking what money he required for his own use and for presents to his wife and daughters, the defendant at his request sometimes taking out money for him for such purposes. The notes were never alluded to except in the way indicated.

Held, that neither a good *donatio mortis causa* nor gift *inter vivos* to the defendant was shown; but that J. W.'s intention was that the defendant should be paid for her services; and she was accordingly allowed for the board and attendance on J. W. as well as for the board of his wife.

Macdonnell, Q.C., and *Machar*, for the plaintiff.

McIntyre, Q.C., for the defendant.

IN CHAMBERS.

[FERGUSON, J., 10TH FEBRUARY, 1890.

In re CRUICKSHANK.

Devolution of Estates Act—Selection by widow of specific piece of land—Election against dower.

This was an application by the widow and administratrix of one Cruickshank, deceased, for an order or direction that she might be at liberty to select a specific piece of real estate as and for her one-third interest under the Devolution of Estates Act, she having elected by deed to take one-third of her husband's undisposed of real estate in lieu of dower. Three infant children of the deceased were the only other persons interested in the estate. Valuations of two valuators, one selected by the widow and the other by the official guardian, both showing that the value of the portion of land selected by the widow was somewhat less than one-third of the whole real estate, were put in. The property of the deceased was all freehold.

F. A. Anglin, for the widow, referred to Rule 1006.

J. Hoskin, Q.C., for the infants.

FERGUSON, J., directed that the widow might select the piece of land proposed, upon the official guardian being satisfied that creditors had been advertized for, debts paid, and as to title to the remaining lands.

[ROBERTSON, J., 31ST JANUARY, 1890.

In re SOLICITORS.

Solicitor and client—Costs of unnecessary proceedings—Disallowance of—Proceeding by writ of summons where summary application sufficient—Administration order.

The solicitors instituted an action on behalf of a young woman, one of two residuary legatees and devisees under a will, against the executors and trustees, for an account. Upon the pleadings charges of negligence in getting in rents, etc., and of refusal to account were made against the defendants, and it was stated that a release was obtained from the other residuary legatee in the absence of his solicitor, immediately after his coming of age, by taking advantage of his necessities.

At the trial judgment was given in the usual terms of an administration order, reserving further directions and costs; and by the judgment on further directions the plaintiff was given the general costs of the action against the defendants, saving, however, costs incurred by the plaintiff proceeding by writ of summons instead of by summary application for an administration order, and the plaintiff was ordered to pay the extra costs occasioned to the defendants by such proceeding.

Held, that no question was raised by the plaintiff which could not have been disposed of in the Master's office; and, under the circumstances, in the absence of any evidence to shew that the client had, with knowledge of the practice of the Court and the risk she ran, expressly instructed the solicitors to proceed in the way they did, they could not tax against her any more costs than they would have been entitled to had they proceeded by notice of motion instead of by writ of summons.

Scanlan v. *McDonough*, 10 C. P. 104, specially referred to.

Bain, Q.C., for the solicitors.

William Davidson, for the client.

[10TH MARCH, 1890.

FOWLE v. CANADIAN PACIFIC R. W. CO.

Discovery—Examination of officer of railway company—Section foreman.

In an action to recover the value of horses killed by a train on the defendants' railway, it was alleged by the plaintiff and

denied by the defendants, that the latter had failed to erect and maintain proper fences on either side of the railway where it crossed the plaintiff's property.

Held, that the foreman who had charge of the fences on the railway in the section which included the *locus in quo*, subject to the orders of a roadmaster, was not an officer of the defendants who could be examined for discovery.

Knight v. *Grand Trunk R. W. Co.*, *ante* p. 68, and *Leach* v. *Grand Trunk R. W. Co.*, *ante* p. 67, followed.

C. J. Holman, for the plaintiff.

A. MacMurchy, for the defendants.

[FALCONBRIDGE, J., 24TH FEBRUARY, 1890.

In re SOLICITOR.

Costs — Taxation between solicitor and client — Retaining fees—Special circumstances.

The solicitor acted on behalf of a client in defending him upon a charge of arson and in bringing actions against two insurance companies to recover for a loss by fire. At the time the solicitor's services were required the client had no money and no prospect of getting any, and, in consequence of the risk the solicitor ran of getting nothing and losing a considerable sum for disbursements, the client offered him a retaining fee to be paid out of the insurance moneys when recovered, and it was agreed between them that such fee should be $150 for the two actions, the amount claimed in the actions being about $1,250.

Held, upon appeal by the assignee of the client for the benefit of creditors from the taxation of the solicitor's costs, that under the exceptional circumstances of the case, the amount of the retaining fee was not unreasonable.

Douglas Armour, for the assignee.

J. B. Clarke, for the solicitor.

[28TH FEBRUARY, 1890.

ROBB v. MURRAY.

Parties—Joint contractors—Rule 324 (a).

Under an incomplete agreement with the plaintiff, the defendant and one R. went into possession of the plaintiff's shop, intending to carry on business as partners. The agreement never was completed, the defendant and R. were put out of the shop, and the plaintiff brought this action to recover the amount received by the defendant from sales of goods while in possession of the shop.

The defendant asserted that the contract was a joint one on the part of himself and R., but the plaintiff and R. denied this.

Held, that an order under Rule 324 (a) compelling the plaintiff to add R. as a party defendant, in the character of a joint contractor, was under the circumstances a proper order.

Hoyles, Q.C., for the plaintiff.

Shepley, for the defendant.

[14TH MARCH, 1890.

FERGUSON v. SAMPEY.

County Court—Removal of action to High Court—Coram non judice.

Purdom, for the plaintiff moved for an order removing this action from a County Court to the High Court, the action having been by mistake brought in the County Court, and the amount claimed being beyond the jurisdiction.

D. Armour, for the defendant, opposed the motion, citing *Meyers* v. *Baker*, 26 U. C. R. 16, and *O'Brien* v. *Welsh*, 28 U.C.R. 394.

FALCONBRIDGE, J., said that he was bound by the cases cited to hold that he could not remove an action which was *coram non judice* where it was brought, and that the statutory provisions enacted since those decisions (see R. S. O. c. 44, ss. 96-100, 158; c. 47, ss. 23-25) did not alter the law laid down.

Motion refused with costs to the defendant in any event.

[MACLENNAN, J. A., 18TH MARCH, 1890.

WILLIAMSON v. ELLIS.

Divisions of High Court—Chambers motion.

A motion for final judgment under Rule 756 was made returnable before a Judge in Cnambers on Tuesday the 18th March. The action was in the Chancery Division. On that day the only Judge sitting in Chambers was MACLENNAN, J.A., who was sitting for and at the request of GALT, C.J. C.P., to take Chambers in the Queen's Bench and Common Pleas Divisions.

C. Millar, for the plaintiff, brought the motion on before MACLENNAN, J.A., when

D. Armour, for the defendant, objected.

MACLENNAN, J.A., declined to hear the motion. He referred to s. 60 of the Judicature Act, R. S. O. c. 44, and said that as no Rules were in force providing for one Judge hearing motions in all Divisions, he should follow the practice laid down in *Re Christie*, 12 P. R. 15.

[THE MASTER IN CHAMBERS, 29TH FEBRUARY, 1890.

PAYNE v. NEWBERRY.

Motion—Renewal of, where refused—Judgment under Rule 739.

Where the plaintiff's motion for judgment under Rule 739 was dismissed because he had not observed the practice under Rule 1251 of partly complying with an order upon him for security for costs by paying $50 into Court, and he subsequently paid the money in and renewed the application upon the same material:—

Held, that the dismissal of his first application was no bar to the second one.

Semble, it would have been otherwise had the plaintiff failed in his first application by reason of defects in his material, and made a second one upon new material supplying the defects.

E. Taylour English, for the plaintiff.

Douglas Armour, for the defendant.

[8TH MARCH, 1890.

BUILDING AND LOAN ASSOCIATION v. BETZNER.

Chattel mortgage—Affidavit of bona fides sworn before execution.

This was an interpleader application made by the sheriff of Waterloo to the Master in Chambers on the 7th March, 1890.

R. V. Clement, for the sheriff.

A. Cassels, for the execution creditors.

Crooks, for the claimant.

THE MASTER IN CHAMBERS.—In the interpleader arising out of this case it has been agreed by the parties that instead of making an interpleader order sending this case for trial, I should consider the matter—being indeed simply a question of law—and give a final order disposing of the rights.

The claimant is a lady who advanced $1,000 on the security of a chattel mortgage, and the question is now between this mortgagee and a judgment creditor who claims to seize for his debt upon a *fi. fa.* the goods covered by the mortgage. The sheriff has interpleaded. The case, as respects the mortgagee, appears to be strictly honest and correct. The money was advanced on the 7th of the month on the mortgage security agreed to be given. It happened that the parties to the mortgage resided in different places, so the business was conducted through agents. And so by misfortune it turned out that the mortgagee swore to the statutory affidavit necessarily to be made by the mortgagee, on the 12th of the month, whereas the mortgage was not executed by the mortgagor until the following day—the 13th.

I am bound by authority exactly in point. On the 15th October, 1885, the Court of Appeal held in a case of *Reid* v. *Gowans*, which came from the County Court of Hastings, that a chattel mortgage made on the 13th, the same statutory affidavit as to which was made by the mortgagee on the 8th, was invalid. In that case, as in the present, the claim of the mortgagor was perfectly honest, but the mortgage was held bad.

If parties choose to dispute the rights of a mortgagee in such a case, they may be in a legal position to do so.

My order will be the usual final order in interpleader, protecting the sheriff, and ordering him to sell the goods under

the *fi. fa.* The claimant to pay all costs of the interpleader, of the sheriff, and of the plaintiffs.

Because the decision given on the argument by the Court of Appeal has not been reported, I now give my decision in writing, that there may appear in the reports a reference to the case on this point.

NEW BRUNSWICK.

In the Supreme Court.

[FEBRUARY, 1890.

Ex parte BAIRD.

Elections—Dominion Elections Act—Nomination papers, when valid—Power of County Court Judge to order recount—His jurisdiction defined—Prohibition to restrain recount—Jurisdiction of Supreme Court Judge at Chambers.

At an election of a member to represent the electoral district of Queen's, N.B., held in February, 1887, George F. Baird and G. G. King were the candidates. King's nomination paper was signed by upwards of twenty-five electors of the district, and was also assented to and signed by him, and verified by the oath of one W., who presented it, and paid the returning officer the deposit of $200, required by law; and the returning officer gave W. a certificate of having received King's nomination paper, his consent thereto, and the $200 deposit. At the declaration the returning officer stated the number of votes received for each candidate at the several polling stations, but before he announced the general result of the votes cast, Baird's agent objected that King had not been legally nominated, inasmuch as the deposit of $200 had not been made by King's legally appointed agent, and contended that all votes given for King were therefore null and void and should be rejected, and that Baird, being the only legally nominated candidate, should be declared legally elected. The return-

ing officer adopted this view and declared Baird elected, though it was admitted that King had received the majority of votes polled. An application was then made to the Judge of the County Court for a recount, which he granted; and to stay proceedings under this order a rule nisi for prohibition was obtained from a Judge of the Supreme Court at Chambers.

The majority of the Court concurred in the judgment of

ALLEN, C.J.—There was no objection to the nomination paper presented for King whatever. All the provisions of the statute respecting nomination papers were complied with. It was signed by upwards of twenty-five electors; it contained the written consent of King to his nomination; the deposit of $200 was paid to the returning officer at the time; W., who produced the nomination papers to the returning officer made oath to the facts required to be sworn to by the 21st section, and the returning officer received the paper and the deposit, gave W. a certificate to that effect, and granted a poll for taking the votes of the electors for the two candidates. If the nomination was insufficient the returning officer might have rejected it, but he did not do so, but on the contrary received it and adjudged it sufficient, and every act that he did at that time shewed that he so decided. I think, even assuming his decision to have been wrong, (which, however, I do not) his power of adjudicating upon the sufficiency of the nomination paper was at an end when he accepted it and granted a poll, and he had no right afterwards at the time for adding up the votes to decide that King's nomination was illegal and that the votes polled for him were null and void, and therefore that Baird was the only legally nominated candidate. *Regina* v. *Mayor, etc., of Bangor*, 18 Q. B. D. 347.

Had the affidavit which was laid before the County Court Judge merely stated that the deputy returning officers had improperly counted or rejected ballots, I would probably have thought that sufficient was shown to give the Judge jurisdiction to issue the order which he did, as the Act only requires the person making the affidavit to state his belief as to the improper counting or rejection of ballots. But the affidavit goes much further than that and shews that the real object of the proposed re-count was, not to rectify an improper counting of the votes given, whereby a wrongful result was arrived at by the returning officer, but in effect to reverse his decision that all the votes given for King were null and void, and to enable the Judge of the

County Court to certify to the returning officer that King had the highest number of votes, in order that the returning officer should be obliged to declare King elected. This, I think, the Judge had no power to do. His power in the matter only extends to rectifying mistakes in counting votes arising either from improper admission or rejection of ballots, or the wrong adding up of the number of votes, whereby a candidate who had not really received a majority of votes given, had been declared elected. However illegal the act of the returning officer was in deciding that King was not legally nominated, and therefore that the votes given for him could not be counted, that was a matter which the Judge of the County Court had no power by the Act to rectify. I therefore think a prohibition would lie in this case. Though in a mere re-count of the votes the duties of the County Court Judge may be only ministerial, yet in cases where he has to determine whether ballots have been improperly received or rejected by a returning officer his duties would be judicial. In the latter case a prohibition would lie if he exceeded his jurisdiction.

Rule absolute for prohibition without costs.

L. A. Currey, for the applicant.

H. H. McLean, contra.

IN CHAMBERS.

(EQUITY SIDE.)

[PALMER, J., 18TH FEBRUARY, 1890.

In re KEILLOR.

Will—Construction of—Legacy—Great-grandchildren.

Trustees made application to the Court for directions as to the construction of certain clauses in a will. The question was:—Are the children of Emma J., wife of M. O., and a granddaughter of Ann Chapman, a deceased sister of the testator in the will mentioned, being great grand-children of Ann Chapman, entitled to any distributive part or share in the sum of one thousand

dollars in and by the said will bequeathed as follows :—" To the children of my deceased sister Ann Chapman now living, and the children of those who may be dead."

Held, that the children and grand-children living at the time of the testator's death were entitled to a distributive share, but that the great-grandchildren were not.

W. B. Chandler, for the trustees.

Hanington, Q.C., *W. W. Wells*, and *H. A. McKeown*, for claimants.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 8th March, 1890.

CONMEE v. NORTH AMERICAN CONTRACTING CO.

Costs—Taxation—Counsel fees—Witness fees—Re-opening taxation.

Upon appeals from taxation of costs, the Court will not interfere with the discretion of the taxing officer as to the *quantum* or *quoties* of fees; and this rule covers any question of distribution or allotment of charges among different cases or branches of a case.

Where costs were awarded to the plaintiffs upon a postponement of the trial, and the case was not tried till after the taxation of such costs was closed, but it appeared upon appeal from the taxation that some of the witnesses allowed for were not called when the case was actually tried, the taxation was reopened upon payment of costs, and the taxing officer was directed to reconsider the allowance of witness fees.

C. J. Holman, for the plaintiffs.

Aylesworth, for the defendants.

VILLAGE OF FORT ERIE v. FORT ERIE FERRY R. W. CO.

Issues—Separate trials of questions arising in action—Rule 655—R. S. O. c. 44, s. 52, s-s. 12.

An action brought to enforce the performance by the defendants of a certain by-law passed by the plaintiffs, and also the performance of a duty imposed by the Railway Act, came on for trial without a jury, and the trial Judge decided to try the first branch of the case separately, and after hearing evidence upon it, held that the by-law was not legally binding upon the defen-

dants, and dismissed the action without hearing evidence on the second branch.

Held, that Rule 655 must be read in conjunction with s. 52, s-s. 12, of the Judicature Act, R. S. O. c. 44; and this case was not one calling for an application of the Rule by directing separate trials of the questions raised. A new trial was therefore ordered.

Osler, Q.C., and *German*, for the plaintiffs.

A. G. Hill and *Aylesworth*, for the defendants.

ELLIOT v. McCUAIG.

Courts—Divisional Court—Jurisdiction in County Court action—Order for arrest.

A Divisional Court has power under Rule 1051 to set aside or vary an order for arrest made by a County Court Judge in a County Court action.

Pepler, for the plaintiff.

Plaxton, for the defendant.

In re DERBY AND THE LOCAL BOARD OF HEALTH OF SOUTH PLANTAGANET.

Municipal corporations—Public Health Act, R. S. O. c. 205, s. 49—Payment for services of physician—Judgment against local board of health as a corporation—Order upon treasurer of municipality—Mandamus.

Section 49 of the Public Health Act, R. S. O. c. 205, provides that "the treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction by virtue of this Act."

A physician recovered judgment in a Division Court against a township local board of health, sued as a corporation, for services performed in a small-pox epidemic. It appeared that the physician had been appointed medical health officer of the municipality by the council, but that before suing the board he had brought an action against the municipal corporation for his services, in which he failed.

Upon motion by the physician for a mandamus under s. 49 to compel the board to sign an order upon the treasurer of the municipality for the amount of the judgment recovered:—

Held, that, although it might be difficult to conclude that a board of health is constituted a corporation by the Act, yet the judgment of the Division Court practically decided that this board might be sued as such, and, not being in any way impeached, it could not be treated as a nullity.

As there appeared to be no other remedy, the applicant was entitled to the mandamus.

Shepley, for W. J. Derby.

Aylesworth, for the members of the local board of health.

DODDS v. CANADIAN MUTUAL AID ASS'N.

Insurance—Life—Provision for payment in case of "total disability"—Construction of provision—Evidence.

The plaintiff, who was a farmer, had his life insured by the defendants, and there was a clause in the policy or certificate of insurance providing that in case of "total disability" of the insured the insurers would pay him one-half of the amount of the insurance. About two years after effecting the insurance the plaintiff conveyed his farm to his son, reserving to himself and wife certain benefits, but continued to work upon the farm for about a year thereafter, when he was attacked by bronchitis and asthma.

In an action to recover one-half the amount of the insurance the evidence shewed that the plaintiff was totally disabled, permanently and for life, from doing manual labour, and that the diseases from which he suffered were the proximate and immediate cause of his disability. A medical witness said that he considered the plaintiff's condition attributable to a considerable extent to his advanced years, he being about seventy.

Held, that total disability to work for a living was what was intended to be insured against, and disability from old age was not excluded, and the evidence shews that the plaintiff came within the terms of the certificate. The arrangement made by the plaintiff with his son after the certificate was issued could have no effect upon the prior contract of insurance.

Elgin Meyers, for the plaintiff.

Watson, Q.C., for the defendants.

LAMB v. YOUNG.

Bankruptcy and insolvency—Insolvent debtor—Mortgage to creditor—Action by assignee under R. S. O. c. 124, to set aside—Notice or knowledge of insolvency.

Held, following *Johnson* v. *Hope*, *ante* p. 59, that an assignee for the benefit of creditors under R. S. O. c. 124, suing to set aside as void a mortgage of real estate made by his assignor when in insolvent circumstances, to a creditor, must in order to succeed establish that the creditor knew at the time he took the mortgage that the mortgagor was insolvent and unable to pay his debts in full.

MacKelcan, Q.C., and *Mewburn*, for the plaintiff.

Clute, Q.C., for the defendant.

[BOYD, C., 14TH MARCH, 1890.

SPRATT v. WILSON.

Trusts and trustees—Investment of moneys left to infants by will—Deposit in savings bank—Liability of trustee for legal interest—Acquiescence of statutory guardian of infants—Costs.

Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the Court. And,

Held, that an executor and trustee who deposited funds so left in trust for infants, at three and a half or four per cent. interest in a savings bank did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infants, not being for their benefit, did not relieve him.

Held, also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs.

Bicknell, for the plaintiff.

H. H. Robertson, for the defendant.

[STREET, J., 19TH JUNE, 1888.

[ARMOUR, C. J., 14th DECEMBER, 1888.

McINTOSH v. ROGERS.

Vendor and purchaser—Action for specific performance—When title first shown—Removal of incumbrance—Question of title or conveyance—Mortgage thirty years old—Presumption of payment—Delivery and verification of abstract—Costs of action.

In an action by a vendor to compel the purchaser specifically to perform a contract for the sale and purchase of land, the Master reported that a good title was shewn before action.

Upon appeal from the report:—

Held, that if the vendor, in answer to a requisition with regard to an incumbrance disclosed by the abstract delivered, had replied that it would be removed when the time arrived for closing the purchase, the requisition as an objection to the abstract would have been completely answered, the question when so treated being one of conveyance and not of title; but when the vendor in this case replied that the mortgage in question was not an existing incumbrance at all, the question became one of title, which the purchaser was entitled to have disposed of before accepting the title.

2. That the mere fact that the mortgage in question was over thirty years old did not necessarily raise a presumption of payment, especially in view of certain peculiar terms of payment contained in it, and of the fact that it had been recognized as an incumbrance by express reference in recent conveyances.

3. That a good title is not shown until a perfect abstract is delivered, which is true and which the vendor is able and willing to verify as delivered; and that a statement in the abstract that the heirs of J. G. had conveyed to W. G. by registered instrument No. 22096 was untrue, because it turned out that the registered instrument was not executed by two of the grantors named in it, although its supposed counter-part, which was not produced by the vendor, was executed by all the grantors.

Special findings of the Master upon questions affecting the costs varied.

Upon the hearing on further directions and costs it was ordered that each party should bear his own costs up to the trial; that the defendant should have costs up to the time when a good title was shewn; and the plaintiff should have costs thereafter.

The judgment of BOYD, C., at the trial of this action is reported 14 O. R. 97, and a former judgment of STREET, J., upon appeal from the Master's report in 12 P. R. 389.

The action was by a vendor to compel the specific performance by the purchaser of a contract for the sale and purchase of land.

The defendant now appealed from the report of the Master at London, dated 7th May, 1888, in which he found :—

1. That a good title could be made to the land.

2. That it was first shewn that a good title could be made on the 16th December, 1886.

3. A number of special facts as follows :—

(*a*) That the agreement in writing signed by the defendant was read over the defendant at the time it was so signed, and that he understood its meaning.

(*b*) That no misrepresentation as to its contents or otherwise was made to him.

(*c*) That all the title deeds and evidences of title in the possession of the plaintiff, together with a registrar's abstract of recorded instruments, were delivered to the defendant before action.

(*d*) That there was no evidence before the Master that the defendant made any objection after its delivery and before action to the registrar's abstract so delivered.

(*e*) That before action the defendant refused to be bound by the agreement of sale or to perform his part thereof, alleging through his solicitor that he had executed it owing to misrepresentations as to title and evidences of title, made by the plaintiff.

(*f*) That the defendant before the commencement of this action more than once refused to investigate the title and complete the title in compliance with the terms of the agreement signed by him.

(*g*) That before action a conveyance in the terms of the written agreement was tendered on behalf of the plaintiff to the defendant, who referred the same to his solicitor, and it was then tendered to the defendant's solicitor, and both were at the same time requested to complete the purchase of the lands, but refused so to do, and such conveyance was at the request of the defendant made to his wife as grantee.

(*h*) That the plaintiff on his part before action had complied with the agreement in writing according to its tenor, and was always ready and willing to complete the sale and conveyance of the land to the defendant.

(*i*) That the deeds and evidences furnished by the plaintiff before action did not at the time of their delivery disclose a complete registered title in the plaintiff to the lands in question,

neither did they shew that the plaintiff was unable to give a good title to the lands to the defendant.

(*k*) That before action the plaintiff contended that as he had, in compliance with the tenor of the agreement, furnished the defendant with all deeds and evidences of title in his possession, it was incumbent on the defendant under the said agreement to investigate the title at his own cost, and refused to admit any other construction of the agreement, claiming that the defendant on the evidence furnished and upon investigation of title, was bound to complete the purchase.

(*l*) That since action commenced, the plaintiff has complied with certain requisitions as to evidence of title, which the defendant had pointed out before action.

(*m*) That from the evidence it appears that the defendant was ready and willing whenever the plaintiff should comply with his demands as to evidence of title, to complete the purchase, and had paid the plaintiff's agent on account of the purchase money the sum of twenty dollars upon entering into the agreement.

(*n*) The plaintiff has always since the date of the agreement been in possession by his tenants of the premises in question and in receipt of the rents and profits.

(*o*) That it appears from the evidence that at the date of the agreement and up to the date of the action being commenced, and subsequent thereto, until produced by the plaintiff during the progress of the reference, there was in existence a deed purporting to be a duplicate of one of the registered deeds produced by the plaintiff before action and numbered in the abstract as "22096," which alleged duplicate was discovered by the plaintiff in the possession of William Glass, who held the subsisting mortgage upon the lands, but who from the evidence does not appear to have claimed to hold it in his capacity as mortgagee, but was willing to have delivered it to the plaintiff at any time.

(*p*) That at the time of the agreement and before action brought, there was an undischarged mortgage held by a corporation known as the Middlesex Building Society upon the premises in the said agreement mentioned, of which the plaintiff was cognizant, and has pending the present reference had discharged.

(*q*) That the conveyance referred to as number "22096" was incomplete in not being executed so as to pass their interests in the land by two of the grantors named therein.

The appeal was argued before STREET, J., on the 15th June, 1888.

G. W. Marsh, for the appellant.

Hoyles, for the respondent.

Judgment was delivered on the 19th June, 1888.

STREET, J.—The defendant appeals from or seeks to vary all of the findings of the Master excepting the first clause and (g) (n) (p) and (q).

The effect of the contract between the parties was settled by the judgment of the Chancellor at the hearing of the cause, reported in 14 O. R. 97. Certain questions with regard to the title came up before me upon a former appeal from the certificate of the Master, and the title was then referred back to him for further evidence and consideration. See 12 P. R. 389. The evidence before me then as to the title was composed entirely of that which was brought into the Master's office, and was much more full than that which had been submitted to the purchaser before the action was begun. It is the latter evidence that I am principally to consider upon the present appeal.

The exception taken to the clause in the present report which declares that it was first shewn that a good title could be made on the 16th December, 1886, are these:—

1st. That there was then shewn to be an outstanding mortgage on the property to the Middlesex Building Society, which the plaintiff refused to clear off.

2nd. That the abstract and declarations delivered shewed that certain persons claimed as heirs at law of John Guernsey and that no sufficient proof of their title as such heirs was given.

3rd. That, assuming the evidence to shew that they were the heirs-at-law of Guernsey, the abstract stating that they had conveyed to Samuel Glass was not properly verified.

As to the first of these questions, it appears that shortly after the contract was entered into, a registrar's abstract of title was delivered by the vendor's solicitor to the purchaser's solicitor, which disclosed on its face an outstanding mortgage from William Wright and wife to the Middlesex Building Society dated 26th February, 1850, for £100, registered as memorial No. 744. The purchaser's solicitor on 24th December, 1886, served requisitions, one of which was as follows:—

"Produce No. 744 and register a proper discharge thereof."

The vendor's solicitor answered: "The vendor declines to produce No. 744, as it is over thirty years old, and says also that the declarations of William and Samuel Glass, which the purchaser's solicitor now has, are a sufficient answer.

The declarations referred to each contain the following paragraph with reference to this mortgage: "That there appears to be a mortgage on the said lands, No. 744 on the registrar's abstract, which I believe to be paid, as I never heard of it till informed by the solicitor of McIntosh, nor have I ever been asked to pay the said mortgage or the interest thereon or any part thereof, and I verily believe the said mortgage was fully paid and satisfied."

The question as to this mortgage came before me upon the former appeal, and, for the reasons I then entered into at some length, I came to the conclusion that there was no presumption under the circumstances that the mortgage had been satisfied, and that no sufficient proof had been given either that it had been paid, or that the right of the mortgagees under it had been barred by the Statute of Limitations.

In reply to the vendor's answer to his requisitions, the purchaser's solicitor on 4th January, 1887, again urged his objection thus: "No. 744 must be produced and a proper discharge of it registered, for the deeds produced show that it is unpaid and in force, and evidence of that fact must have been in the possession of William and Samuel Glass when they made their declarations, and they are therefore no sufficient answer to the requisition."

The vendor's solicitor answered this request as follows on the 5th January, 1887: "I cannot submit to any further trifling in this matter, and unless the transaction is completed and the money paid by ten o'clock to-morrow morning a writ will be issued to enforce specific performance." In answer to which the purchaser's solicitor replied that he was willing to close the matter and pay the purchase money upon a good title being presented; that a good title had not yet been presented; and that he could not advise his client to close the matter and pay his purchase money. This action was begun upon the following day. Prior to the action being commenced the vendor's solicitor tendered to the purchaser and his solicitor a conveyance of the property, to which the vendor was a party, but to which the alleged incumbrancers the Middlesex Building Society were not parties. It appears in evidence that after the reference back to the Master

following the former appeal, evidence was given in the Master's office that in the month of September, 1887, the vendor's solicitor has paid to the treasurer of the Middlesex Building Society the sum of $20, which that gentleman stated upon being called as a witness was the 113th monthly payment under the rules of the society, and that upon its payment the mortgage was satisfied subject to the question as to the right of the mortgagees to recover the fines which accrued every month during the period of default. That this final payment became due on the 22nd March, 1858, and that no payment had been made upon the mortgage since 22nd October, 1857. until September last, when the $20 was paid by the vendor's solicitor.

The terms of payment of the money secured by this mortgage are set out in my former judgment.

Since the reference back to the Master the vendor has obtained from the Middlesex Building Society and has registered a discharge of the mortgage in question.

The vendor insists that the finding and report of the Master that a good title was first shewn by him on 16th December, 1886, is correct, because the circumstances disclose that the rights of the mortgagees under the mortgage to the Building Society are shown to have been barred before that date by the Statute of Limitations, and because whether barred or not the fact that a mortgage was outstanding is a matter of conveyance and not of title.

I do not think the finding of the Master can be supported upon either ground. The abstract delivered to the purchaser disclosed an incumbrance in the shape of this mortgage which the purchaser was entitled to have removed before completing his purchase. If the vendor in answer to the purchaser's first requisition with regard to it had replied that the incumbrance would be removed when the time arrived for settling the conveyance or for closing the purchase, I think the requisition as an objection to the abstract would have been completely answered, because mere incumbrances of this kind are treated not as questions of title but of conveyance. The convenience of this is obvious. The vendor in most cases requires the purchase money for the very purpose of paying off the incumbrances, and if the purchaser were entitled to insist that they should be paid off and shewn to be discharged upon the abstract, it would be impossible for the vendor in many cases to shew a

perfect abstract of title. By treating them, however, as matters of conveyance and not of title, the settlement of them is postponed until the conveyance is settled, when the incumbrancers may be made releasing parties to it, or until the final closing of the matter, if they are to be discharged in the manner provided by the Registry Laws, and the verification of the abstract is proceeded with in the meantime. So that even where incumbrances are shewn by the abstract to exist to an amount greater than the whole purchase money, the purchaser will be compelled to proceed with the verification of the abstract as a matter of title, because it is to be inferred that the vendor will at the time the transaction is closed provide funds sufficient along with the purchase money to clear them off. But where the vendor in answer to requisitions with regard to incumbrancers, instead of treating them as matters of conveyance, to be cleared off at the time of the delivery of his conveyance, replies that they are not existing incumbrances at all and sets up a certain state of facts which he alleges is sufficient to shew that the purchaser must take the title without any removal of them, then it is obvious that the question ceases to be one of conveyance, and becomes one of title, which the purchaser is entitled to have disposed of before accepting the title. See upon a somewhat similar question *Wynne* v. *Griffith*, 1 Russ. 283. The vendor is bound in his abstract in such a case to state the facts upon which he relies as shewing that the incumbrance has ceased to exist and that the estate has become revested in him, and to prove these facts upon the verification of the abstract. But the vendor here in answer to the purchaser's requisition did not allege a state of facts which, if true, exonerated him from further proof that the incumbrance had ceased to exist. He said "the vendor declines to produce number 744, as it is over thirty years old, and says also that the declarations of William and Samuel Glass, which the purchaser's solicitor now has, are a sufficient answer." The declarations referred to are made three years before, and are those of persons one of whom never had had any estate in the land save as a mortgagee, so far as the abstract shows, and the other of whom had owned it only from 1876 to 1883, and are to the effect that they never had been asked to pay the mortgage money or any part of it and that they believed it to have been fully paid and satisfied. The mere fact that the mortgage was over thirty years old did not necessarily raise a presumption of pay-

ment, especially in view of the peculiar terms of payment contained in it, and of the fact which I pointed out in my former judgment, and which I must assume was known to the purchaser's solicitor, that it had been recognized as an incumbrance by express reference in conveyances of a comparatively recent period. I find here therefore a vendor meeting a requisition with regard to an incumbrance by an argumentative statement that it is no longer in force, but giving no sufficient reasons to support his assertion, and then when the purchaser calls his attention to the fact that it is recognized as an incumbrance in the later conveyances, his objection is treated as trifling and a writ is at once issued. The learned Master at London in reporting that a good title was shewn on 16th December, 1886, has no doubt treated the mortgage as a mere matter of conveyance and not of title. For the reasons I have given I am of opinion that it had been made a matter of title, and that his finding is erroneous.

Another objection raised to the finding of the Master that a good title was shewn on 16th December, 1886, arises upon the following facts. The vendor claimed title through certain persons alleging themselves to be the heirs-at-law of John Guernsey, deceased. A conveyance purporting to be from these persons to Samuel Glass, dated 25th October, 1876, was registered shortly after that date, as number 22096.

In his requisitions of 24th December, 1886, the purchaser asked for the production of this instrument, to which the vendor replied that number 22096 was in the possession of William Glass as a mortgagee. On 4th January, 1887, the purchaser replies that William Glass states that he delivered number 22096 to the vendor's solicitor on 7th September, 1883, and that it has not been returned to him. I have already quoted the reply of the vendor's solicitor to all the requisitions of 4th January, 1887, and the immediate issue of the writ.

The requisition of the purchaser here seems to have been a perfectly proper one, and is not met at all by the vendor, and the purchaser was not bound to close the matter without some verification of the abstract. During the taking of the evidence in the Master's office a conveyance was found to be in the possession of William Glass from the heirs-at-law of John Guernsey, but without any certificate of registration indorsed upon it: this conveyance is referred to in my former judgment. It now appears that subsequent to the reference back to the Master the

original conveyance number 22096 was examined in the Registry office, and it was then discovered that two of the grantors named in it had actually not executed it, although they had signed the receipt for the purchase money in the margin. The statement in the abstract therefore that the heirs of John Guernsey had conveyed to Samuel Glass by registered instrument number 22096 was untrue and could not have been verified by the only means of verification pointed out by the abstract, even if the purchaser had been bound to go to the Registry office to verify it; while the instrument which was alleged to be the counterpart of the original registered instrument number 22096 and to be in the hands of William Glass was not its counterpart, because it was really executed by all the parties, and was therefore not a registered instrument at all. A good title is not shown until a perfect abstract is delivered, which is true, and which the vendor is able and willing to verify as delivered; and I am of opinion that the purchaser's further objection to the Master's finding as to the time at which a good title was first shewn must be sustained upon the narrow grounds that the abstract was untrue in stating that the heirs of Guernsey had conveyed to Glass by the registered instrument number 22096, and that they refused to produce any verification of their statement. For these reasons I think that the second clause of the report should be amended by striking out the words "16th day of December, 1886," and inserting in their place the words "29th day of March, 1888," that being the day upon which the objections seem to have been removed by the plaintiff.

The special findings of the Master, made at the purchaser's request with regard to the purchaser's objections and the position taken by him, are those lettered from (*i*) to (*q*) both inclusive; those lettered from (*a*) to (*h*) both inclusive, are those which have been made at the vendor's request. The vendor has not appealed against any of these findings. The purchaser has appealed against most of them. They are made in pursuance of a direction in the amended judgment, that the Master is to report specially on any matter in the pleadings affecting the question of costs. The evidence and correspondence leave no doubt, I think, as to the position taken by each of the parties before action and as to what was really the cause of the litigation. The plaintiff contended that he was not bound to show a good title; that he was bound only to furnish the evidences of title in

his possession. This appears from the memorandum at the foot of his answers of 28th December, 1886, to the defendant's requisitions, where he says: "And lastly in answer generally to all the purchaser's requisitions, the vendor says he is not bound to produce any title deeds or evidences of title except those in his possession, which he has already delivered to the purchaser's solicitor." The fact that he issued a writ as an answer to the further requisitions made upon him shows that he considered either that he had shown a good title or that he was entitled to compel the defendant to accept such title as the papers which he had delivered showed him to have. In the result it appears that he had not shown a good title, and it was decided by the Chancellor that he could not force upon the purchaser anything short of a good title.

The plaintiff's views of the contract were stated by his solicitor to the purchaser's solicitor on the 14th December, according to the evidence of the latter, which is not contradicted, and he then stated to the plaintiff's solicitor that if this construction of the contract were correct, and by its terms his client were compellable to accept anything less than a perfect title, he would refuse to be bound by it, because the vendor's agent had represented to the purchaser that under the contract he was entitled to insist upon a good title. On the 15th December the purchaser's solicitor wrote to the defendant's solicitor, "As I stated to you yesterday, my client is quite willing and desirous of purchasing the property in question, provided a good title is given him, but he declines to be bound by the contract of purchase that he signed in Mr. Buckle's office, as he was induced to sign it by misrepresentations . . . I herewith return the abstract; please have it completed to date and return it to me as soon as possible, and I will at once furnish you with my requisitions."

These requisitions were furnished on 24th December, and answered on the 28th December by the vendor's solicitor, with the saving clause shewing his interpretation of the contract, to which saving clause the purchaser's solicitor replied on the 4th January, 1887, "That he has given the vendor due and full notice of the terms on which he will purchase this property and on which he is examining the title;" and in his final letter of 5th January, 1887, he says "you have only to present a good title and my client will at once accept it."

To come to the special findings, I think that (*a*) and (*b*) are misleading in the way they are stated. It is no doubt true that the agreement was understood by the defendant at the time he signed it in the sense in which it was interpreted by the Chancellor at the hearing, and that it was stated by Buckle, the agent, at the time it was signed as bearing that meaning, but it is equally true that the plaintiff insisted upon a different interpretation of it, and that in the sense in which the plaintiff interpreted it the defendant did not understand it when he signed it, and that he never objected to carry it out in the sense in which it was finally interpreted; therefore I think these two findings (*a*) and (*b*) should be struck out of the report. The finding (*c*) should stand, because the unregistered conveyance from the heirs of Guernsey was not in the plaintiff's possession but in the possession of Glass in December, 1886. The finding (*d*) should be struck out, because the defendant did object that the abstract did not show a good title, and his objection to the mortgage to the the Middlesex Building Society there appearing, has been sustained. The finding (*e*) should be struck out, because it appears that the defendant was willing to carry out the contract according to the interpretation which has been placed upon it by the Chancellor. The finding (*f*) should be struck out, for the same reason. The finding (*g*) should be struck out, because it is immaterial whether or not a conveyance was tendered by the plaintiff under the circumstances: the plaintiff, never having before action shown a good title, had no right to tender a conveyance. The finding (*h*) should be struck out, because the plaintiff had not before action complied with the agreement, as its meaning has been interpreted, viz., that if he desired to force the title upon the purchaser he was bound to show a perfect one. In finding (*i*) the words "neither did they shew that the plaintiff was unable to give a a good title to the lands to the defendant" should be struck out, because it was the plaintiff's duty to show a good title. The finding (*k*) should stand without alteration, and so should all the remainder of the findings. I think it will not be necessary to send the report back to the Master, but that it may be amended in red ink, the amendments being stated to be made under the order to be taken out upon this appeal. The defendant should be allowed against the plaintiff three-fourths of the costs of the appeal, the plaintiff should be allowed against the defendant one-fourth of the costs of opposing the appeal.

The action afterwards came on for hearing on further directions and as to costs before Armour, C. J., the same counsel appearing.

Judgment was delivered on the 14th December, 1888.

ARMOUR, C.J.—Each party will bear his own costs up to and including the hearing, and subject to this the defendant will be entitled to his costs up to the time when a good title was shewn, and the plaintiff will be entitled to his costs thereafter.

If there is any other matter in difference between the parties, I will dispose of it on application.

[A subsequent judgment of STREET, J., upon certain questions as to interest and costs is noted 9 Occ. N. 135.]

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 1ST MARCH, 1890.

LEESON v. BOARD OF LICENSE COMMISSIONERS OF THE COUNTY OF DUFFERIN.

License Commissioners—Mandamus—Notice of action—R. S. O. c. 194.

Held, affirming FALCONBRIDGE, J., that a mandamus to compel the defendants to issue a liquor license to the plaintiff would not be granted where the retiring commissioners had not done all that was necessary on their part to secure the issue of a license to the plaintiff, and their successors refused to ratify and complete what had been done.

Held, also, that a notice of action is necessary before action brought for damages against a board of license commissioners acting under R. S. O. c. 194.

A. H. Marsh, for the plaintiff.

Delamere, Q.C., for the defendants.

[BOYD, C., 14TH MARCH, 1890.

SIBBALD v. GRAND TRUNK R. W. CO.

New trial—Excessive damages—Death of party between verdict and judgment.

Where since verdict and before judgment in an action for damages against a railway company, one of the parties to whom damages were awarded died, and the verdict was now moved against on the ground of excessive damages :—

Held, that the Court had power to order a new trial.

If such damages are given as are likely to work injustice, in case death intervenes between verdict and judgment, the Court has power to interfere by granting a new trial.

Shepley and *S. W. Burns*, for the plaintiffs.

Osler, Q.C., and *Wallace Nesbitt*, for the defendants.

[ROBERTSON, J., 8TH JUNE, 1889.

ANDERSON v. HANNA.

Statute of Limitations—Lands—Heirs-at-law—Tenant by the curtesy—Redemption judgment—Mortgage—Power of sale.

Held, that the Statute of Limitations in respect to the recovery of lands does not begin to run against heirs-at-law during the life of the tenant by the curtesy, even though the right of the latter to recover the lands may have become barred by the statute.

Proper judgment where in such circumstances the heirs-at-law take proceedings for redemption of the lands during the life of the tenant for life.

Wigle v. *Merrick*, 8 C. P. 307, and *Re Gilchrist & Island*, 11 O. R. 537, followed.

J. H. Ferguson and *J. B. O'Brian*, for the plaintiffs.

Reeve, Q.C., and *J. A. Mills*, for the defendants Hanna and Kerr.

D. C. Ross, for the defendants Fitch and the Western Canada Loan & Savings Company.

[19TH FEBRUARY, 1890.

BLACKLEY v. KENNY.

Mortgage to secure future advances—Voluntary conveyance—Subsequent advances—Renewal notes—Land held in suretyship—Giving time—Release—Assignment for benefit of creditors—Trustee representing estate—Proof of judgment of Court of Appeal—Evidence.

A., being indebted to a firm of which B. was a member, in January, 1883, gave him a mortgage as trustee for the firm to

secure his indebtedness and all future advances. In September, 1884, A. with the advice and concurrence of B. conveyed the mortgaged property to his wife subject to the mortgage, which he covenanted to pay off, the mortgage debt being then represented by ten promissory notes. As the notes respectively became due they were retired by B.'s firm from the bank where they had been discounted; payments were made thereon by A., further goods were supplied to him, renewals taken for the balances due, and the old notes were cancelled and given up to A. until the whole ten were thus disposed of. The wife was not consulted about this course of business, nor were any remedies reserved against her.

Held, that this was not payment of the original notes by A.; but that as the wife was a surety in respect of the land for the due payment of the notes existing at the time of the conveyance to her, the land in her hands was discharged and released.

Held, also, following the decision of the Court of Appeal in this case, 16 A. R. 522, that B. could not charge against the land any advances made after notice of the conveyance to the wife.

The plaintiff set up that in another action of F. assignee and T. B. & Co. as judgment creditors against these defendants (16 A. R. 276), the conveyance to the wife had been held fraudulent and void as against creditors, and that, although his firm's security might be gone under the mortgage, they had proved their claim as creditors and were entitled to participate *pro rata* with the other creditors in the proceeds of the sale of the land.

Held, that, as the conveyance was made with the advice and co-operation of the plaintiff, by his conduct he agreed to this alienation of the assets, and must be considered to have consented to take satisfaction out of the property which remained.

Held, also, that although Rule 309 provides for trustees suing and being sued as representing the property or estate of which they are trustees, the Court of Appeal having held that F. had no *locus standi*, he could not be considered as representing the parties who were beneficially interested, and all the claims allowed to F. as assignee for creditors must be disallowed.

Held, also, that the judgment in *Ferguson* v. *Kenny*, 16 A. R. 276, or *Tait, Burch, & Co.* v. *Kenny*, as it was after F. was struck out, was not evidence in this action.

Semble, that a certified copy of the certificate of the Registrar of the Court of Appeal as to the result of an appeal is not proper evidence of the judgment in the Court of Appeal.

A. C. Galt, for the defendants Kenny, who appealed.

Walter Macdonald, for the plaintiff.

George Kerr, for Ferguson, the assignee.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 8TH MARCH, 1890.

LINK v. BUSH.

Costs—Set-off—Claim and counter-claim separate and distinct—Rule 1204.

The plaintiff recovered judgment against the defendants with costs upon a claim for the value of goods sold under a distress for rent of which the defendant, the landlord, himself became the purchaser; and the defendant recovered judgment against the plaintiff with costs upon a counter-claim for rent and damages to the demised premises. The judgment did not direct any set-off, and the plaintiff's solicitors having asserted a lien upon the judgment for costs against the defendant, the taxing officer refused to allow a set-off of the costs awarded to the plaintiff and defendant respectively.

Held, that the claim and counter-claim were separate and distinct and the judgments must be treated as judgments in separate actions; and Rule 1204 did not apply to enable the taxing officer to deduct or set off costs.

Under the circumstances of this case the Court (ROSE, J., dissenting) deprived the plaintiff, who was finally successful upon the appeals as to costs, of the costs of the appeals.

M. G. Cameron, for the plaintiff.

W. H. Blake, for the defendant.

IN CHAMBERS.

[FERGUSON, J., 21ST MARCH, 1890.

ST. CROIX v. McLACHLIN.

Arrest—Order for, signed by Judge instead of clerk.

Rule 544 provides that all orders made by a Judge of the High Court in Chambers shall be signed by the clerk in Chambers.

Held, that an order for the arrest of the defendant signed by the Judge who made it, and not by the clerk, was not properly issued.

FERGUSON, J., was also of opinion upon the evidence that the defendant was not about to quit Ontario with intent to defraud, and, acting upon both grounds, discharged the defendant from custody.

E. D. Armour, for the defendant.

William Macdonald, for the plaintiff.

[ROBERTSON, J., 19TH MARCH, 1890.

In re CHAPMAN AND CITY OF LONDON.

Justice of the peace—Jurisdiction to hear charges against corporation—R. S. C. c. 174, ss. 80 and 140—"Person" in R. S. C. c. 1, s. 7, s-s. 22—Prohibition.

The law has not been altered in any way by 32 & 33 V. c. 29, s. 28, (R. S. C. c. 174, s. 140) so as to give justices of the peace jurisdiction in any matter which they did not have prior to the passing of that statute.

The word "person" in R. S. C. c. 1, s. 7, s-s. 22, includes any corporation to whom the context can apply according to the law of that part of Canada to which such context extends, but as justices of the peace never had jurisdiction by the criminal procedure to bear charges of a criminal nature preferred against corporations, such word does not include corporations in cases where a justice of the peace is attempting to exercise such a jurisdiction.

A justice of the peace cannot compel a corporation to appear before him; the "body" of a corporation cannot be taken into custody; he cannot proceed *ex parte*, nor can he commit or detain them in custody, nor can he bind them over to appear and answer to an indictment; and that being so, he has no jurisdiction to bind over the prosecutor or person who intends to present the indictment.

A writ of prohibition can issue to a justice of the peace to prohibit him from exercising a jurisdiction which he does not possess.

J. B. Clarke, for the city of London.

C. Hutchinson, for Chapman.

[MacMahon, J., 12th March, 1890.

SIMPSON v. MURRAY.

Dismissing action—Want of prosecution—Rule 647—Default of entry for two sittings—Notice of trial for second sittings.

Where the plaintiff was in default for not giving notice of trial for the autumn assizes, but the defendant did not move to dismiss the action, and the plaintiff gave notice of trial for the winter assizes, but neither party entered the action for trial:—

Held, that the action could not be dismissed for want of prosecution under Rule 647.

McDougald v. *Thomson*, 13 P. R. 256, followed.

W. M. Douglas, for the plaintiff.

W. H. Blake, for the defendant.

[17th March, 1890.

ONTARIO BANK v. TROWERN.

Judgment debtor—Examination of—Return of nulla bona.

Notwithstanding changes made in the practice as to examining judgment debtors, embodied in Rule 926, a judgment debtor is not under the new, any more than under the old, practice examinable until the judgment creditor has placed a *fi. fa.* in the sheriff's hands, and it has been returned *nulla bona*, or the sheriff has notified the judgment creditor that if called upon to make a return it would be *nulla bona*.

Walter Barwick, for the plaintiffs.

William Macdonald, for the defendant F. P. Lee.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.D.]

[4TH MARCH, 1890.

MARSHALL v. McRAE.

Master and servant—Wrongful dismissal—Right to dismiss—Grounds of dismissal—Exercise of right—Forfeiture of property.

The plaintiff, who was the inventor of a certain machine and had assigned certain patents therefor to the defendant, agreed to obtain patents for certain improvements made by him upon the machine and to assign them to the defendant as soon as obtained, and the defendant in consideration thereof agreed to employ the plaintiff for two years from the date of the agreement for the purpose of demonstrating and placing the patents on the market, and to pay him a certain sum for salary and also his expenses, and the plaintiff and defendant were to share the profits in certain proportions.

The tenth clause of the agreement was as follows :—" It is further agreed that the party of the first part (the defendant) is to be the absolute judge as to the manner in which the party of the second part (the plaintiff) performs his duties under this agreement and shall have the right at any time to dismiss him for incapacity or breach of duty, in which event the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal, and shall have no claim whatever against the party of the first part."

The defendant dismissed the plaintiff within three months of the date of the agreement for alleged disobedience and incapacity, without communicating to the plaintiff his reasons for so acting or calling upon him for any explanations.

Held, HAGARTY, C.J.O., dissenting, that the plaintiff had certain rights of property under the agreement; that the parties to it therefore did not occupy merely the relation of master and servant; and that the the tenth clause did not give the defen-

dant a right arbitrarily to dismiss the plaintiff, but that he occupied a quasi-judicial position and was bound to act in good faith and to inquire into the circumstances upon which he based his determination to dismiss, this necessarily involving notice to the plaintiff and an opportunity of being heard.

Russell v. *Russell*, 14 Ch. D. 471, distinguished.

Judgment of the Queen's Bench Division, 16 O. R. 495, affirmed.

McCarthy, Q.C., and *J. J. Scott*, for the appellant.

Moss, Q.C., and *Carscallen*, for the respondent.

REGINA v. WASON.

Constitutional law—Criminal law—Criminal procedure—B. N. A. Act, s. 91, s-s. 27—51 V. c. 32 (O.)—52 V. c. 15 (O.).

The "Act to provide against frauds in the supplying of milk to cheese or butter manufactories," 51 V. c. 32 (O.) does not deal with criminal law within the meaning of s. 91, s-s. 27, of the B. N. A. Act, but merely protects private rights and is *intra vires*.

So also the "Act respecting appeals on prosecutions to enforce penalties and punish offences under Provincial Acts," 52 V. c. 15 (O.), is not legislation dealing with criminal procedure within the meaning of that sub-section and is *intra vires*.

Judgment of the Queen's Bench Division, 17 O. R. 58, reversed.

E. Blake, Q.C., and *Irving*, Q.C., for the appellant.

E. B. Edwards, for the respondent.

C.P.D.]

SINDEN v. BROWN.

Justice of the peace—Summary conviction—Fine—Distress—Part payment—Imprisonment—Notice of action—R. S. C. c. 178, ss. 60-67—R. S. O. c. 73, s. 14.

The defendant was convicted under the Canada Temperance Act and was adjudged to pay a fine and costs, to be levied by distress if not paid forthwith, and in default of sufficient distress to be imprisoned, etc. The defendant paid the costs but not the fine, and a distress warrant was issued against him, and nothing being made under this warrant he was committed.

Held, that the commitment was illegal.

Trigerson v. *Board of Police of Cobourg*, 6 O. S. 405, approved and followed.

If a portion of the penalty is paid before commitment the amount paid must be restored before the alternative punishment is resorted to.

Held, also, that the magistrate having, in the honest belief that he was acting in the execution of his duty as such, issued the warrant of commitment after part payment of the penalty, he was, though acting without jurisdiction, entitled to notice of action, and that no notice having been given, the action failed.

Judgment of the Common Pleas Division, 17 O. R. 706, affirmed on other grounds.

McCarthy, Q.C., and *DuVernet*, for the appellant.

Aylesworth, for the respondent.

TEMPERANCE COLONIZATION CO. v. FAIRFIELD.

Contract — Fraud—Rescission — Repayment of consideration — Statute of Frauds—Uncertainty.

This was an appeal by the plaintiffs from the judgment of the Common Pleas Division, reported 16 O. R. 544, and came on to be heard before this Court (Hagarty, C.J.O., Burton, Osler, and Maclennan, JJ.A.), on the 13th and 14th of November, 1889.

McCarthy, Q.C., and *A. H. Marsh*, for the appellants.

J. J. Maclaren and *McClive*, for the respondent.

Judgment was given on 4th March, 1890, dismissing the appeal with costs.

Per HAGARTY, C.J.O.—The agreement was void for uncertainty, the land in question not being in any way defined or ascertained, or capable of being defined or ascertained, and at any rate misrepresentations justifying rescission were proved.

Per BURTON, OSLER, and MACLENNAN, JJ.A.—The plaintiffs were unable to give to the defendant the right of selection they had agreed to give him, so that the action necessarily failed, and the defendant was entitled to judgment on his counter-claim, there being a failure of consideration.

Per BURTON, J.A., also—The agreement was in itself sufficiently certain, and was not void for misrepresentation.

Per MACLENNAN, J.A., also—No misrepresentations justifying a rescission of the contract were proved, but the agreement was void for vagueness and uncertainty.

C. C. York.]

THORNLEY v. REILLY.

Liquor License Act—Sale of liquor after notice—Notice, how given—R. S. O. c. 194, s. 125.

This was an appeal by the defendant from the judgment of the County Court of York, 9 Occ. N. 491, and came on to be heard before this Court (Hagarty, C.J.O., Burton, Osler, and Maclennan, JJ.A.), on the 13th February, 1890.

Murdoch, for the appellant.

Le Vesconte, for the respondent.

The plaintiff, a married woman, brought the action under R. S. O. c. 194, s. 125, to recover from the defendant, an hotel-keeper, damages because of the sale by him to her husband of intoxicating liquors after notice not to sell. The notice was signed by the plaintiff and served by her agent.

The action was tried before Macdougall, Co.J., and a jury, and the damages were assessed at $100. The defendant contended that notice signed and served as aforesaid was not sufficient and that notice by the inspector was necessary. The learned Judge decided against this contention, and judgment was entered for the plaintiff.

Judgment was given on 4th March, 1890. The Court was divided in opinion, and the appeal was dismissed with costs.

Per Hagarty, C.J.O., and Burton, J.A.—The right of action for damages depends on the notice being given by the person filling the public position of inspector, though the liability as far as the penalties are concerned will be incurred upon notice being given by a private individual. This is the reasonable construction of the words, "person requiring the notice to be given," in themselves, and would appear to be the intention of the Legislature, these narrower words having been substituted for the wider ones of the former section.

Per Osler and Maclennan, JJ.A.—The whole scope and effect of this section must be looked at and a liberal construction given to it. The notice must in all cases be signed by the private individual, and whether served by the inspector or not, the private individual gives the notice, and the words may fairly be construed to mean "person requiring to give the notice," and there is a right of action whether the notice is served one way or the other.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 8th March, 1890.

MENDELSSOHN PIANO CO. v. GRAHAM.

Partnership — Agreement for participation in profits — Construction of — Relationship of parties —Joint business—Debtor and creditor.

The plaintiffs sued G. and W. for the price of goods sold to the firm of P. W. G. & Co., and the principal question in the action was whether W. was an actual partner in the firm; the evidence failing to shew that he was an ostensible partner and as such liable to third persons.

Held, that the true test to be applied to ascertain whether a partnership existed was to determine whether there was a joint business, or whether the parties were carrying on business as principals and agents for each other.

G. and W. did not intend to create a partnership between them. G. was carrying on business in the name of P. W. G. & Co. as a dealer in pianos and organs, and, being in want of money, applied to W. for a loan; he did not ask W. to become his partner, nor did W. suggest it; but G. proposed to give W. half the profits of his business if W. would lend him $500. The money was advanced and the following receipt was given by G.:—

"Toronto, 13th February, 1888.

"Received from W. the sum of $500 to be used in carrying on the business of dealers in pianos and organs, in return for which I agree to give the said W. one-half of the profits of said business, after all expenses have been paid, including the sum of $10 a week, which is to be charged as wages to G.; this agreement to continue until the 1st day of January, 1889, and to be continued thereafter if desired by Mr. W. The said W. reserving a claim upon instruments in the store to the value of $500, and he can also at any time demand the said sum upon giving one month's notice, in which case this agreement would be at an end."

W. made a subsequent advance of $500 to G., and on the 14th April, 1888, a receipt was given for such advance containing an agreement to pay "over and above the agreement of 13th February, interest at the rate of eight per cent. per annum."

This receipt was at the request of W. signed "P. W. G. & Co., p. P. W. G., sole partner of said firm."

Held, that these documents did not establish that the business was the joint business of G. and W., or that they were carrying it on as principals or agents for each other; but they did establish that the true relation was that of debtor and creditor; and W. was therefore not liable to the plaintiffs.

R. S. Neville, for the plaintiffs.

Coatsworth, for the defendant West.

REID v. COLEMAN.

Partnership—Dissolution—Want of public notice—Credit given to firm after dissolution—No previous dealings with firm—Liability of retiring partner.

The plaintiffs received from their traveller an order for goods from the firm of C. Bros., hotel keepers. Before they delivered the goods they became aware by means of a mercantile agency that a partnership had existed under the name of C. Bros., and that S. L. C. was one of the members of it, and they were at the same time informed that the partnership still existed. They shipped and charged the goods and also goods subsequently ordered to C. Bros. As a matter of fact, however, the partnership did not exist at the time the first order was given, S. L. C. having retired from the business, and the plaintiffs had had no dealings with the firm while it was in existence. No public notice was given of the dissolution; S. L. C. continued to live at the hotel except when he was absent on his own business; the lamp with the name of C. Bros. continued at the door; the liquor license in the name of C. Bros. continued to hang in the bar-room; and letter-paper with the heading "C. Bros., proprietors,' continued to be handed to customers.

Held, that where a member of a firm retires from it, and credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware as one of the public that it existed, and has not become aware of his retirement, the retiring member of the firm is liable unless he shows that he has given reasonable public notice of his retirement; and, as such notice was not given here, S. L. C. was liable, not only for the goods first ordered, but for those subsequently ordered, no notice of the retirement having ever been given.

C. Millar, for the plaintiffs.

J. M. Clark, for the defendant S. L. Coleman.

COCKBURN v. BRITISH AMERICA ASSURANCE CO.

Insurance—Fire—Interim receipt—Powers of local agent of insurance company—Approval of company—Indorsements on application—Non-repudiation of contract—Prior insurance—Eighth statutory condition—Assent of company—Election not to avoid—Extension of policy.

A local agent of the defendants effected an insurance against fire upon the plaintiff's steam power saw mill and machinery, and issued to the plaintiff an interim receipt therefor dated 4th July, 1888, purporting to be issued by the defendants. The plaintiff at the same time insured the property in other companies. The plaintiff had a prior insurance upon the same property effected by the defendants and held a policy therefor and had also a prior insurance in another company. The local agent enclosed the application for the second insurance to the defendants in a letter dated 17th July, 1888, in which he stated that he sent the policy representing the prior insurance by concurrent book-post, to be extended in a manner specified. The defendants received the policy and made the desired extension; and in an action upon the policy and the subsequent interim receipt the jury found that they had also received the letter enclosing the application. The defendants, however, acted throughout as if they had not received it, and on 7th September, 1888, after they had been furnished with a copy of the application, they wrote to the agent requesting him to take up the interim receipt and return it to them, and informing him that as it had run one-half of the term they had debited him with half the premium as earned, and on the same day they re-insured half the risk in another company. The plaintiff was never informed that the defendants had refused the risk, and he was ignorant of it till after the fire, and the defendants never returned him any portion of the premium paid.

The application for the second risk correctly stated the amount of insurance on the property but not the names of the companies insuring. In the copy of the application subsequently sent to the defendants it was not stated that the defendants had a prior insurance. Indorsed on the application was the following: "Special. To be submitted to the company for approval before receipt is issued;" and "Applications for insurance on property where steam is used for propelling machinery must be approved by the head office at Toronto before the company will be liable

for any loss or damage." The plaintiff's attention was not drawn to these indorsements, and he was not aware that the agent had no authority to grant the interim receipt on this account. The agent swore that he had never received instructions not to grant an interim receipt under such circumstances.

Held, that the indorsements formed no part of the application signed by the plaintiff, and that the agent was acting in the apparent scope of his authority, and was to be deemed *prima facie* to be the agent of the company; and as the defendants never repudiated the contract, but merely determined to put an end to it and treated it as a subsisting contract, they were liable upon it.

Under the eighth statutory condition the defendants claimed that they were not liable upon the receipt because there was prior insurance in another company and their assent did not appear in and was not indorsed on the policy, or that they were not liable upon their earlier insurance because of the subsequent insurance in other companies without their assent.

Held, that the application and the interim receipt constituted the contract of insurance, and as in this contract the total amount of insurance was truly stated, and the contract continued to be binding until after the loss occurred, the defendants must be considered to have assented to such insurance, and they would be compellable to make their assent appear in or to have it indorsed on the policy, if such policy were issued.

Held, also, that the prior insurance was voidable, not void, and that the defendants, after the subsequent contract was entered into in which the total amount of insurance was stated, and after they knew that it was entered into, had elected not to avoid the prior insurance but to treat it as still subsisting by extending it.

Semble, that the defendants, having assented to the insurance stated in the contract of insurance, could not assert that the effecting of such insurance had the result of avoiding the prior insurance effected by their policy.

Wallace Nesbitt, for the plaintiff.

Laidlaw, Q.C., for the defendants.

[Rose, J., 6th December, 1889.

BROOKE v. BROWN.

Trusts and trustees—Provisions of will—Implied powers of trustees—Reasonable building lease—Specific performance of agreement for.

The plaintiffs were trustees under a will holding the legal estate in the property devised and bequeathed in trust to maintain themselves and their children, with remainder over to the children upon the death of themselves; with power to absolutely convey the property and to exclude any child from participating in the remainder.

Held, that the plaintiffs had implied power to make all reasonable leases.

The plaintiffs made an agreement for a building lease to the defendant of part of the trust estate for twenty-one years, with a provision for compensation to the defendant at the end of the term for his improvements; and the draft lease settled provided that the plaintiffs should at the end of the term pay for such improvements or renew the lease for a further term of twenty-one years.

Held, that the provisions of the agreement and lease were reasonable, and bound the trust estate, and that the plaintiffs were entitled to specific performance.

Matthew Wilson, for the plaintiffs.

Morson, for the defendant.

[Street, J., 21st March, 1890.

MARTIN v. McMULLEN.

Bankruptcy and insolvency—Assignment for benefit of creditors—R. S. O. c. 124—Valuing security—Guaranty, construction of.

A deceased person, of whom the plaintiff was executor, gave the defendants a guaranty in respect of goods sold and to be sold to another, in the following terms:—"I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater sum than $2,500."

The principal debtor, being indebted to the defendants in $5,500, made an assignment under R. S. O. c. 124, and the

defendants filed a claim with the assignee but did not in the affidavit proving the claim state whether they held any security or not. At a later date the plaintiff paid the defendants the $2,500, and filed a claim with the assignee.

Held, that the guaranty was not a security which the defendants were required to value under the Act, and that the omission from their claim of a piece of information which could not affect it did not render it invalid.

Held, also, that this was a guaranty, not of part, but of the whole of the debt, limited in amount to $2,500, that is, a guaranty of the ultimate balance after all other sources were exhausted; and the plaintiff was not entitled to rank upon the estate in respect of the $2,500, nor to recover any part of any dividend which the defendants had received.

Hobson v. *Bass*, L. R. 6 Ch. 792, distinguished; and *Ellis* v. *Emmanuel*, 1 Ex. D. 157, followed.

S. G. McKay, for the plaintiff.

G. C. Gibbons, for the defendants.

[MacMahon, J., 9th April, 1890.

ABRAHAM v. ABRAHAM.

Alimony—Registration of judgment for—Assignment by defendant for general benefit of creditors—Priorities—R. S. O. c. 44, s. 30—R. S. O. c. 124, s. 9.

The precedence given to an assignment for the general benefit of creditors by R. S. O. c. 124, s. 9, over "all judgments and all executions not completely executed by payment," does not extend to a judgment for alimony registered against the lands of the defendant prior to the registration of the assignment; for by R. S. O. c. 44, s. 30, the registration of such a judgment is to have the same effect as the registration of a charge by the defendant of a life annuity on his lands; and the defendant could not convey the lands unless subject to the charge so created; and therefore a general assignment for the benefit of creditors by the defendant in an alimony action, which was not executed until after judgment against him, and not registered until after the registration of the judgment, did not take precedence of the judgment, and the plaintiff was not obliged to rank with the other creditors of the defendant.

Idington, Q.C., for the defendant Hossie.

Osler, Q.C., and *W. M. Douglas*, for the plaintiff.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 8TH MARCH, 1890.

CAMERON, v. WALKER.

Title to land—Statute of Limitations—When statute begins to run—Married woman—Removal of disability of coverture—Mortgagee—Date of mortgage.

A. and B. intermarried in 1841. B. acquired three lots of land in 1866, and the defendant was put in possession of them in 1869, and received a deed of one of them in 1870. The defendant remained in possession until 1888. In 1881 A. and B. made a mortgage of the other two lots, and A. died in 1884. The plaintiff purchased these two lots from an assignee of the mortgagee under the power of sale in the mortgage, and put up a fence around them dividing them from the lot conveyed to the defendant, and the defendant pulled it down. The plaintiff then brought an action of trespass.

Held, affirming the judgment of ROSE, J., that B.'s disability of coverture having been removed in 1876 by 38 V. c. 16, s. 5, the Statute of Limitations ran against her from that date, and the defendant had acquired a good title by possession. But

Held, reversing the judgment of ROSE, J., as the plaintiff was a person claiming under the mortgage, the statute did not commence to run against him until the date of the mortgage, which was less than ten years before action, and he was therefore entitled to succeed.

G. M. Macdonnell, Q.C., for the plaintiff.

McIntyre, Q.C., for the defendant.

[BOYD, C., 13TH MARCH, 1890.

KENNEDY v. HADDOW.

Mechanics' lien—Prior mortgage—Subsequent lien—Increase of selling value of the land—Priority.

Before a mortgagee having priority upon the mortgaged premises for payment of his security is postponed to the claim of one who subsequently does work upon the premises, it must be clearly proved that the selling value of the land has been increased by the work done.

The mortgage should retain its priority to the extent of the value of the security before the work is begun in respect of which the lien attaches, and the lien should have priority only to the extent of the additional value given by the subsequent improvements.

The Court has always been solicitous to protect mortgagors from being improved out of their property, and under the Mechanics' Lien law the Court must be equally solicitous to protect mortgagees from being improved out of their security.

C. J. Holman, for the mortgagee.

Hoyles, Q.C., for the lien-holders.

[2ND APRIL, 1890.

In re McLEAN AND WALKER.

Sale of land—Agreement—When payment to be made—Title—Prior mortgage—Time to take possession—Interest.

In an agreement for the sale of land it was provided that the cash payments should be made and the mortgage for the balance given "so soon as the solicitors for the purchaser shall be satisfied with the title."

Held, that the meaning of the contract was that payment was not to be required until such title was shown as would justify the purchaser in taking possession; and, following *Wills* v. *Maxwell*, 32 Beav. 552, that no satisfaction being given as to a prior mortgage affecting the land until two years after the agreement, the purchaser could not prudently take possession until then, and interest on the purchase money should only be allowed from that time.

H. Cassels, for the vendor.

Moss, Q.C., for the purchaser.

[3RD APRIL, 1890.

In re GOODFELLOW; TRADERS BANK v. GOODFELLOW.

Banks and banking—Warehouse receipt—Wheat, conversion of into flour—Following moneys representing such flour—R. S. O. c. 120, s. 56.

The Traders Bank took a warehouse receipt from one G., a miller, on 2800 bushels of wheat in his mill on 12th August, 1888. G. died on the 19th June, 1888. Shortly before his

death the bank became aware that there was a shortage of wheat in the mill and took possession of what was then there, viz., some 700 bushels. It was proved that as a matter of fact there had been a shortage ever since 27th August, amounting to never less than 638 bushels. Subsequently to 27th August some wheat had been manufactured into flour and sold out of the mill by G., and some $105 had come into the hands of the administrator of his estate from this source, which sum was a great deal less than the value of 638 bushels of wheat. There was no attempt to prove that this flour was made from the identical 2800 bushels of wheat in the mill when the receipt was given.

Held, on appeal from the report of the Master at St. Thomas, that the bank were entitled to follow this sum of $105 in the hands of the administrator and to claim the same under their warehouse receipt.

Lefroy, for the appeal.

E. T. Malone, contra.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 8TH MARCH, 1890.

REGINA v. CANTILLON.

Summary conviction—Liquor License Act—Minute of adjudication—Imprisonment without prior distress—Costs of conveying to gaol.

The minute of adjudication on a summary conviction for a second offence against the Liquor License Act, without providing for distress, directed immediate imprisonment on default of payment of the fine and costs, and the conviction drawn up under it was in similar terms. After the issue of a writ of certiorari, but before its return, an amended conviction was returned providing for distress being first made.

Held, that the adjudication and conviction made under it were bad for not providing for distress, and that the amended conviction could not be supported, because it did not follow the adjudication.

Semble, that had the amended conviction been in other respects good, it would not have been bad under the Liquor License Act for including the costs of conveying to gaol.

Du Vernet, for the defendant.

Langton, for the complainant.

REGINA v. ROWLIN.

Summary conviction—Imposition of costs of commitment and conveying to gaol—Offence against Public Health Act, R. S. O. c. 205—R. S. O. c. 74, s. 1.

A summary conviction for carrying on a noxious and offensive trade contrary to R. S. O. c. 205, the Public Health Act, imposed, in default of sufficient distress to satisfy the fine and costs, imprisonment in the common gaol for fourteen days, unless the fine and costs, including the costs of commitment and conveying to gaol, were sooner paid.

Held, following *Regina* v. *Wright*, 14 O. R. 668, that the imposition of the costs of commitment and conveying to gaol were unauthorized, and that s. 1 of R. S. O. c. 74, not referred to in that case, did not affect the question.

Bicknell, for the defendant.

Aylesworth and *F. Waddell*, for the complainant.

[THE DIVISIONAL COURT.

HUFFMAN v. WATERHOUSE.

Innkeeper—Sale of stallion under R. S. O. c. 154, for keep—Lien—Revival of—Tavern license—Owner of.

An innkeeper, claiming to act under R. S. O. c. 154, sold by public auction a stallion belonging to the plaintiff, a boarder at his inn, to enforce his lien thereon for the keep and accommodation thereof.

Held, that the sale was authorized.

After the lien accrued, the plaintiff removed the stallion, and subsequently brought it back to the inn.

Held, that the lien revived on the return of the stallion.

Under s. 12 of R. S. O. c. 194, the person receiving a tavern license is assumed to have satisfied the license commissioners that he is the true owner; but, notwithstanding, it can be shewn that the licensee was merely the agent of another, who was the real owner of the business.

D. O. Cameron and *T. J. Blain*, for the plaintiff.

McFadden and *McKechnie*, for the defendants.

BADGEROW v. GRAND TRUNK R. W. Co.

Railways — Accident — Negligence — Evidence of—Defective brake—Latent defect.

Action by the plaintiff to recover damages for the death of her husband by reason of, as was alleged, a defective brake on a car on the defendants' railway, on which deceased was employed as a brakeman.

Held, that there could be no recovery; for the evidence failed to show how the accident happened; the contention that it was a defective brake was mere conjecture; and even if it were the cause of the accident, it would be no ground of liability, for under the defendants' rules it was the deceased's duty to examine and see that the brakes were in proper working order and report any defect to the conductor, and if he made the examination he apparently discovered no defect, as he made no report. A latent defect is no evidence of negligence; and if the deceased omitted to make the examination, then the accident would be attributable to his own negligence.

J. W. McCullough, for the plaintiff.

Wallace Nesbitt and *W. M. Douglas*, for the defendants.

[MacMahon, J., 30th July, 1889.

ROBERTSON v. LAROCQUE.

Husband and wife—Married woman—Separate business—Separate estate—Debt contracted with reference to—Liability—47 V. c. 19—Effect of.

The defendant, a married woman, married to her present husband in 1877 or 1878, and carrying on business separately from him by farming one of her former husband's farms, in 1883 and 1884 contracted the debt sued on. She was entitled to dower in the lands of her first husband, who died in 1875, which were sold, realizing a large sum, and also to her share in his personal estate, neither of which she had received.

Held, that the Act of 1884, 47 V. c. 19, had not the effect of repealing the prior Acts, and that it was not necessary to shew that the defendant had married or had acquired separate estate since the Act of 1884 came into force; that it was sufficiently shewn that she was possessed of separate estate, and that she intended it should be bound.

The plaintiff was, therefore, held entitled to have judgment against it.

R. S. O. c. 132, s. 5, s-s. 1, makes the earnings of a married woman in a trade or occupation in which her husband has no proprietary interest, separate property.

Peter O'Brian and *C. G. O'Brian*, for the plaintiff.

G. H. Watson and *John Butterfield*, for the defendant.

[10TH DECEMBER, 1889.

SCOTTISH AMERICAN INVESTMENT CO. v. TENNANT.

Consolidation of mortgages.

The plaintiffs, who were the mortgagees under three mortgages from the same mortgagor on different lands, were held entitled only to consolidate in respect of the mortgages in default when action brought to enforce them, and as the amount due on one of the mortgages had then been paid, and there was no default as to it, consolidation was refused.

W. H. Lockhart Gordon, for the plaintiff.

D. Urquhart, for the defendant.

STARK v. SHAND.

Dower—Assessment of yearly sum in lieu of, by report of commissioners—Payable only from filing of report—Dower Procedure Act—O. J. Act.

After action commenced and judgment obtained under the O. J. Act for the recovery of dower in certain lands, proceedings were taken under the Dower Procedure Act for assignment of dower, but the commissioners appointed under the Act, in lieu of assigning dower, reported in favour of a yearly sum being paid. The report was filed in the office of the local Registrar of the Court and in the local registry office on the 22nd February, 1889.

Held, that there could be a recovery of the sums assessed only from the date of the filing.

Held, also, that had proceedings been continued under the O. J. Act, instead of substituting those under the Dower Procedure Act, the plaintiff's remedy would have been different.

Washington, for the plaintiff.

Hoyles, Q.C., for the defendant.

IN CHAMBERS.

[BOYD, C., 1ST APRIL, 1890.

In re BRONSON AND CANADA ATLANTIC R. W. Co.

Costs — Expropriation of land by railway company — "Costs incidental to the arbitration."

In expropriation cases the costs should be taxed liberally in favour of the proprietor; but where the statutes mention "costs," only, and not "full costs," costs as between solicitor and client are not intended.

And where a railway company in expropriating land under the Dominion Railway Act agreed to pay to the land-owners "all costs incidental to the arbitration" had to fix the compensation to be paid :—

Held, that the words did not extend to costs as between solicitor and client, nor to costs preliminary to the arbitration.

Arnoldi, Q.C., for the land-owners.

Shepley, for the railway company.

[15TH APRIL, 1890.

STEPHENSON v. DALLAS.

Judgment under Rule 739—When granted—Leave to defend—Terms—Evidence on motion—Ex parte examination of witness.

When the facts are not clear and free from doubt, leave to sign judgment under Rule 739 should not be granted.

Bank of Minnesota v. *Paye*, 14 A. R. 351, followed.

But where a distinct defence is not made out, terms should be imposed upon the defendant upon his being allowed to defend, as a pledge of his *bona fides;* and in this case the defendant was required to pay into Court or secure one-half of the amount claimed.

The examination of a witness conducted by one party without notice to his opponent is irregular and inadmissible as evidence upon a motion.

H. C. Fowler, for the plaintiff.

Walter Macdonald, for the defendant.

[MacMahon, J., 31st March, 1890.

JARVIS v. LEGGATT.

Prohibition—Division Court—Action on bill of costs—Abandonment of part of claim—Reduction of amount by Judge.

Motion by the defendants for a prohibition to the 6th Division Court of the county of Welland.

The suit was on a bill of costs by the plaintiff as solicitor of the defendants, amounting to $135.38, which was reduced to $100 by the plaintiff deducting therefrom and abandoning the sum of $35.38 so as to bring the claim within the jurisdiction of the Division Court, for which sum the plaintiff sued.

At the trial the learned County Court Judge of Welland deducted from the plaintiff's bill $71.52, and entered judgment for the plaintiff for $63.86.

The prohibition was moved for on the ground that the learned Judge could not consider the amount of the bill without ousting himself of jurisdiction, the total amount thereof being in excess of the jurisdiction of the Division Court.

Holman, for the motion.

Thomas S. Jarvis, contra. An abandonment of part of a claim is not *per se* an abandonment for all purposes. It is still *sub judice* until judgment: *per* Moss, C.J.A., in *Winger* v. *Sibbald*, 2 A. R. at pp. 615, 616. The Judge has power to examine into items of unsettled account exceeding the jurisdiction, when the balance sued for does not exceed the jurisdiction: *per* Harrison, C.J., in *Re Dixon*, 6 P. R. 336, and cases cited; *Higginbotham* v. *Moore*, 21 U. C. R. 326; *Hall* v. *Curtain*, 28 U. C. R. 523.

MacMahon, J.—If the Judge, prior to giving judgment and for the purpose of enabling him to ascertain the exact amount for which judgment should be entered, undertook to tax the bill, he could not ignore the fact that the deduction already made by the plaintiff originally formed part of the bill of costs; that is, he could not have taxed the whole bill and then said that the total sum he had taxed off should be deducted from the $100, as the defendants' counsel insisted should be done. Had the Judge done that, the sum of $35.38 would have been twice deducted from the bill.

In fact, what the Judge did was to deduct from the claim of $100 sued for, the sum of $36.14, leaving a balance of $63.86.

The plaintiff deducted from his bill the amount necessary to give the Court jurisdiction, and the Judge who tried the case

could not by dealing with the whole bill deprive the plaintiff of his right to have his suit tried in that Court.

For the reason last stated no ground could possibly exist for prohibition, and the motion must be refused with costs.

[MACLENNAN, J. A., 14TH APRIL, 1890.

MULOCK v. CAWTHRA.

Money in Court—Payment out to next of kin of deceased party—Personal representative—Revivor.

Money in Court will not be paid out to the next of kin of deceased parties without a personal representative having been appointed and made a party by revivor, except in simple cases, where the sum in Court is small, and the circumstances are such that the Court can see that it is safe to dispense with administration or revivor or both, in order to save costs.

R. M. Macdonald, for the applicants.

McCONNELL v. WAKEFORD.

Security for costs—Residence of one of two plaintiffs out of Ontario—Rule 1242—Indorsement on writ of summons—Order for security—Irregularity—Nullity—Waiver by compliance.

The writ of summons was indorsed with a statement that the plaintiffs resided at the township of Brant, in the county of Bruce, and in the state of Wisconsin, in the United States of America. Upon this an order was issued upon præcipe under Rule 1242 by an officer of the Court requiring one of the plaintiffs to give security for costs and staying proceedings until security should be given. The plaintiffs desiring to arrest the defendants were refused an order because of the stay of proceedings, and then applied for and obtained an order allowing them to deposit $400 with an officer of the Court, instead of giving a bond for security for costs, and also declaring it to be without prejudice to the right of the plaintiffs to set aside the order staying proceedings, and they paid the $400 to the officer accordingly.

Held, that it appeared from the indorsement on the writ that the plaintiffs resided out of Ontario, and that the issue of an order for security under Rule 1242 was thereby warranted; but that the order issued, being against one plaintiff only, was

irregular and might have been set aside; it was not void, however, and was good until set aside; and having been complied with, as it was by the deposit of the money with the officer, the compliance made it good, and it could not afterwards be set aside, notwithstanding the reservation in the order.

Semble, that if it had appeared by the indorsement, as it afterwards did by affidavits, that one of the plaintiffs in fact resided in Ontario, the order for security would have been void, and would have been set aside notwithstanding the compliance with it.

W. H. Blake, for the plaintiff.

W. M. Douglas, for the defendants.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

REGINA v. PETERSON.

Habeas corpus — Escape — New conviction — Warden's authority without certificate.

A statute provided that the "The Warden shall receive into the penitentiary every convict legally certified to him as sentenced to imprisonment therein, and shall there detain him."

Held, that the absence of a certificate, or copy of the sentence, did not make the detention of a prisoner, properly convicted and sentenced, illegal.

Semble, *per* BAIN, J., that even if no such copy of the sentence had originally been delivered to the Warden, and were any such necessary, his possession of it at any time previous to his return to a *habeas corpus* would be sufficient.

A statute provided that "Every one who escapes from imprisonment shall on being retaken undergo in the prison he escaped from the remainder of his term unexpired at the time of his escape, in addition to the punishment he is awarded for such escape." After an escape and before recapture the penitentiary was changed from one building to another.

Held, KILLAM, J., *dubitante*, that a conviction for escape was not necessary to imprisonment for the unserved portion of the sentence.

2. That imprisonment in the new building was lawful.

ATTORNEY-GENERAL v. MACDONALD.

Statutes—Construction of — Specific performance of agreement to pay— Parties—Crown choosing forum.

The name of the S. & R. M. R. W. Co., after some liabilities were incurred for work done, was by statute changed to N. W. C. R. W. Co., and it was provided "that the existing liabilities of the company for work done for the said company shall be a first charge on the undertaking." By subsequent statute it was provided that "the company shall remain liable for all debts due for the construction of the railway, and if such debts are due to contractors, shall cause all just claims for labour, board, and building material in respect of such construction to be paid by such contractors, and in default thereof shall be directly liable to the persons having such claims."

Subsequently a charter issued to the G. N. W. C. R. W. Co. It provided "that the company.....shall be and remain liable for, and shall pay and discharge, all debts which were due on or before the 2nd day of June last past by the N. W. C. R. W. Co. and the S. & R. M. R. W. Co., or either of them, for railway construction, and which have not since been paid and discharged, and the said company hereby incorporated in accepting this charter, do..... covenant.....toand with Her Majesty the Queen ....that they will fully pay and discharge all such debts, and will cause all just claims for labour, board of labourers employed in and about such construction, and building materials in respect of such construction due by contractors, to be paid by such contractors."

Upon demurrer by the railway company to an information on the relation of C. alleging that C. was a sub-contractor, and had done work for M. and P. who were the contractors for the work done for the S. & R. M. R. W. Co; that he, C., had employed a number of men to do such work and had been unable to pay them; that M. and P. were still indebted to C. but the accounts were unsettled; and praying that the accounts might be taken

between M. and P. and C., and between C. and his workmen, and that the company and M. and P. might be ordered to pay :—

Held, 1. That the company was only liable to see to the application of money which it might owe M. and P., its own contractors; and as there was no allegation of any such indebtedness, the demurrer was allowed.

2. The Court will not decree performance of an agreement to pay money.

3. The workmen were necessary parties. The ordinary rule of pleading is that all persons interested must be parties, and where they are not, the record must disclose a sufficient reason for departure from the settled rules.

Per TAYLOR, C.J.—Although the Crown has a right to choose its forum, and sue in any Court, when proceeding in relation to property to which the Sovereign is entitled in right of the Crown; yet the rule is otherwise in informations in which the Crown has no beneficial interest.

SHORE v. GREEN.

Pleading—Pleas in abatement and bar to same count—R. P. Act—Instrument substantially in form given by Act—Non-registration—Action on covenant in unregistered instrument—Costs.

After a plea in abatement had been filed and issue joined upon it pleas in bar were by leave added.

Held, that the plea in abatement was waived, and after trial of the issues it was disregarded.

The defendant, owner of land subject to the Real Property Act, executed a lease of it to the plaintiff, using the form given in the Act respecting short forms of indentures. It purported however to be made in respect of the Act respecting short forms of leases. The lease contained the statutory covenant for quiet enjoyment. The lease was not registered or filed. Afterwards the lessor conveyed the land to H. by a conveyance which made no mention of the lease. In an action upon the covenant for quiet enjoyment, after ouster by H. :—

Held, that the covenant in the lease could be sued upon.

Per KILLAM, J.—The instrument was substantially in conformity with the form given in the R. P. Act and could have

been registered; not having been registered it could not take effect as a lease.

2. Even without registration the covenant might be sued upon.

3. The neglect of the lessee to register his lease was not, but the transfer by the lessor without mention of the lease was, the proximate cause of the damage to the plaintiff.

Quære, per BAIN, J.—Whether the lease was one which could have been registered under the R. P. Act.

Held, per BAIN, J., that the instrument was within the Act respecting short forms of indentures.

Costs of an action of ejectment by the plaintiff against H. were allowed as part of the damages but not costs of some Police Court proceedings arising out of a breach of the peace in an endeavour by the plaintiff's husband to obtain possession.

In re SHORE.

Mortgage—Power of sale—"Without any notice"—Private sale without advertisement.

A mortgage provided that the company (the mortgagees) on default of payment for two months, might without any notice, enter upon and lease or sell the said lands.

By statute 49 V. (Man.) c. 42, s. 6, it was enacted that any mortgage containing such words should be deemed to contain the long form of words in the Act respecting short forms of indentures (C. S. M. c. 61, 2nd sch., 2nd col., No. 13), which provided a method of sale involving the service of a written notice on the mortgagor.

Held, that a sale without notice to the mortgagor could not be upheld.

A power of sale permitted a sale "by public auction or private contract."

Held, that a private sale could be made without previous advertisement of it.

McLAREN v. McCLELLAND.

Ejectment—Plaintiff losing title pending action—Evidence without objection.

When inadmissible evidence is received at the trial without objection, the opposite party cannot afterwards object to its having been received.

In ejectment if at the trial the evidence shows title out of both parties, although in the plaintiff when the writ issued, the plaintiff is entitled to judgment, but for costs only.

FESTING v. HUNT.

Repudiation of contract—Rescission—Quantum meruit.

The plaintiff agreed to serve the defendant for five years, and the defendant agreed at the end of the period to convey to him 240 acres, 50 of which he would break in the preceding summer.

During the term the defendant intimated that he would only convey 160, all unbroken.

Held, that the plaintiff was entitled to treat this as a repudiation of the contract, and to sue upon *quantum meruit* for work and labour.

CAMPBELL v. GEMMELL.

Attachment of debts—Debtor a trustee—Chattel Mortgage Act.

The plaintiff sold a stock of goods to the defendant, and took a mortgage upon it and all goods which might be afterwards added to it, as security for payment. At the same time an agreement was entered into whereby the defendant was to carry on business with the stock, and, after making deductions for expenses, etc., was to remit the receipts to the plaintiff daily.

Creditors of the defendant having attached by garnishee orders certain debts due to the defendant for goods sold in the business:—

Held, that such creditors were not entitled to such debts as against the plaintiff.

Garnishee orders take effect only as against that which the debtor could properly, and without violation of any other rights of any one else, grant.

The Chattel Mortgage Act does not apply to such a case.

WEST CUMBERLAND CO. v. WINNIPEG & H. B. R. W. CO.

Pledge—Deposit—Collateral security—Multifariousness.

As collateral security for the payment of certain acceptances, the defendants deposited with the plaintiffs certain of the defendants' mortgage bonds with power of sale in case of default. After default and recovery of judgment upon the acceptances the plaintiffs filed their bill on behalf of all the holders of similar bonds for a receiver and for sale of the railway.

Held, per BAIN, J., that the legal title in the bonds did not pass to the plaintiffs, but that they were pledgees merely. Their remedy was a sale of the bonds; and not a sale of the railway.

2. That the bill was multifarious in basing the right to a receiver upon the plaintiffs' judgment; for in that the other holders had no interest.

Held, by the full Court upon appeal, that, having regard to the surrounding circumstances, the plaintiffs were not pledgees of the bonds; and that no obligation arose upon them until after sale of them by the plaintiffs under their power.

[TAYLOR, C.J.

In re R. A., AN ATTORNEY.

Attorney—Rule to answer charges—Indictable offence.

A rule will not be granted to compel an attorney to answer charges if they may be made the subject of an indictment.

In re NICOLSON AND THE RAILWAY COMMISSIONERS.

Arbitration—Disqualification of arbitrator—Previous opinion for one party.

Under s. 81 of the Railway Act, 44 V. c. 27 (Man.), a person appointed arbitrator for the settlement of the value of lands taken "shall not be disqualified by reason that he is professionally employed by either party, or that he has previously expressed an opinion as to the amount of compensation."

An objection to an arbitrator that he had previously given a valuation to one party and would naturally be biassed in favour of the amount he had fixed,

Held, untenable in view of the statute.

The section is not limited to arbitrators appointed by a Judge.

MILLER v. McCUAIG.

Mortgage—Mortgagee buying at tax sale—Action on covenant—Removal by mortgagee of buildings—Stay of proceedings—Chambers motion.

After a mortgagee had taken possession under his mortgage, purchased the land at a tax sale, obtained a conveyance, and removed valuable buildings from the land, he obtained judgment upon the covenant in the mortgage.

Upon a motion to stay proceedings on the ground that the judgment had been satisfied:—

Held, 1. That a mortgagee may purchase at a tax sale and then resist redemption. The effect of the purchase is the same as if he had obtained a final order of foreclosure. It does not satisfy the covenant, but an action on the covenant would let in redemption.

2. The removal by the mortgagee of buildings does not prevent an action upon the covenant. Waste is a matter of account.

3. An application to stay proceedings upon a judgment on the ground of its satisfaction can properly be made in Chambers.

GALT v. McLEAN.

Interpleader—Jurisdiction of Referee—Barring parties.

Where an interpleader application before the Referee fails to be disposed of upon a matter of practice, as where the sheriff by his delay, or having taken indemnity from one of the parties, is not entitled to relief; where either the execution creditor or the claimant fails to appear on the return of the summons; where either of them though appearing declines to take an issue; where the claimant though appearing fails to support his claim by any evidence which can be looked at; or where there is some such state of circumstances; the Referee may dispose of the whole question. But where the claimant does support his claim, and the question is whether he has merits or not, then the Referee should order an issue or refer the matter to a Judge.

WESTBOURNE CATTLE CO. v. MANITOBA & NORTH WESTERN R. W. Co.

Railway company—Liability to fence—Adjoining owners.

The liability of a railway company to fence arises by statute only. There is no common law liability to fence either as respects the highways, or as respects adjoining properties.

A statute provided that "Where a municipal corporation for any township has been organized, and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, etc." and further, that, "until such fences and cattle-guards are duly made and completed, and if after they are made and completed they are not duly maintained the company shall be liable for all damages done by its trains and engines to cattle, horses, and other animals not wrongfully on the railway, and having got there in consequence of the omission to make, complete, and maintain such fences and cattle-guards as aforesaid."

Held, that, having regard to the current of previous legislation, the liability of the railway company to fence existed only in favour of the owners or occupants of lands adjoining the railway.

McMICKEN v. PEARSON.

Statutes—Construction—"From day to day."

In a statute regulating the procedure upon a contested election it was provided that the Judge "shall adjourn from day to day until he has pronounced his final judgment;" but there was no provision declaring the proceedings void if this provision was not observed.

Held, that the provision was directory only, and its non-observance did not vitiate the Judge's decision.

[DUBUC, J.

MERCHANTS BANK v. MULVEY.

Promissory note—Presentment—Constitutional law—3 & 4 Anne c. 9.

If a promissory note be at the place of payment at the time it became due, it is sufficiently presented.

3 & 4 Anne c. 9, s. 1, enabling indorsees of notes to sue the maker or indorser was introduced into Manitoba by 38 V. c. 12 (Man.). The Act 34 V. c. 5 (D.) enabling banks to discount promissory notes, etc., implied that notes were negotiable.

[KILLAM, J.

WINNIPEG & HUDSON'S BAY R. W. CO. v. MANN.

Injunction—Ex parte—Misrepresentation in obtaining—Balance of convenience—Costs—Laches—Variance in charges of fraud.

An *ex parte* order for an injunction to last for a few days and until a motion to continue it has been disposed of, was obtained upon a misstatement of a fact material to one of the grounds upon which, in the bill, the plaintiffs' right was founded. Upon an application to continue the injunction:—

Held, that, having in view the great importance to the plaintiffs of maintaining the *status quo* and in the absence of damage to the defendant, the injunction ought to be continued, notwithstanding the misstatement; but the plaintiffs were ordered to pay the costs of the motion.

Burbank v. *Webb*, 5 Man. L. R. 264, considered.

Laches as disentitling to interim injunction discussed.

Variance between misrepresentations as alleged and proved discussed.

[BAIN, J.

CALLOWAY v. PEARSON.

Injunction—Plaintiff's title to office—Wrongful assumption of jurisdiction—Injunction where mandamus proper—Evidence.

The plaintiff, having been elected alderman and taken his seat, and having been unseated by order of the County Judge for lack of proper qualification, obtained an *ex parte* injunction to restrain the mayor from proceeding to a new election, and

from refusing to permit the plaintiff to sit and vote as a member of the council, upon the ground that the County Judge had no jurisdiction. Upon a motion to continue the injunction,

Held, 1. That the plaintiff not being in fact qualified, no injunction should be granted.

2. The Court interferes by injunction only to prevent or restrain injuries to civil property, and in defence of or to enforce rights which are capable of being enforced at law or in equity. The Court has no jurisdiction to restrain persons from acting without authority.

3. Although under s. 9 of the Q. B. Act of 1884 an injunction may issue in cases where the plaintiff would have been entitled to a mandamus at law, yet it must appear that the circumstances would have justified a mandamus; and the only ground of complaint being that the defendant "threatens and intends and will unless restrained," etc :—

Held, that there was nothing to complain of.

4. In any case the absence of the jurisdiction of the County Judge would have to be very fully and clearly shewn.

Supreme Court of Canada.

ONTARIO.] [14TH JUNE, 1888.

PARTLO v. TODD.

Trade-mark—Registration—Effect of—Exclusive right—Property in words designating quality—Rectification of registry.

P., a manufacturer of flour, registered a trade-mark under the Trade-Mark and Design Act, 1879, 42 V. c. 22, consisting of a circle containing the words "Gold Leaf," surmounted by the number 196 and with the word "flour" and P.'s name underneath, the whole surrounded by the words "Ingersoll Roller Mills, Ont., Can." In an action against T. for using a similar mark and selling flour purporting to be the "Gold Leaf" of P. the defendant was allowed to offer evidence to show that "Gold Leaf" was a description applied to flour made by a particular process and was in common use by the trade both in Ontario and the Maritime Provinces prior to the registration of such trade-mark. Section 8 of the Act provides that after registry the person registering a trade-mark "shall have the exclusive right to use the same to designate articles manufactured by him," and the evidence was objected to on the ground that under this section the validity of the trade-mark could not be impugned.

Held, affirming the decisions of a Divisional Court, 12 O. R. 171, and of the Court of Appeal, 14 A. R. 444, TASCHEREAU, J., dissenting, that the evidence was properly admitted; that a trade-mark is not made such by registration, but it is only a mark or symbol in which property can be acquired and which will designate the article on which it is placed as the manufacture of the person claiming an exclusive right to its use that can properly be registered; and that the statute does not prevent a person accused of infringing a trade-mark from showing that it is composed of words or symbols in common use to which no exclusive right of user can attach.

Held, also, that where the statute prescribes no means, by way of departmental procedure or otherwise, for rectification in case

of a trade-mark so improperly registered, the Courts may afford relief by way of defence to an action for infringement.

Held, per GWYNNE, J., that property cannot be acquired in marks, etc., known to a particular trade as designating quality merely, and not, in themselves, indicating that the goods to which they are affixed are the manufacture or stock in trade of a particular person. Nor can property be acquired in an ordinary English word expressive of quality merely, though it might be in a foreign word or word of a dead language.

W. Cassels, Q.C., for the appellant.

McCarthy, Q.C., and *Moss*, Q.C., for the respondent.

[14TH JUNE, 1889.

BROWN v. LAMONTAGNE.

Chattel mortgage—Fraud against creditors—Prior agreement—Additional chattels in mortgage—Effect of.

B. sold a quantity of machinery, tools, and fixtures to one P. for $8,120.98. The goods were in a factory owned by B., and were to be paid for by monthly payments extending over a period of forty-eight months. P. agreed to keep them insured in favour of B. and to give B. a hire receipt or chattel mortgage as security for payment. P. was put in possession of the property and received letters from B. recommending him to certain merchants in Montreal and he went to Montreal and purchased goods from L. among others. Two months after L. sued P. for the price of goods so purchased, amounting to about $1,000, and after being served with the writ in such suit P. gave B. a chattel mortgage on the goods originally purchased, and other goods which it was alleged would have been included in the purchase from B. had it not been claimed that they were not in the factory at the time but were afterwards found to be there. P. had not given a hire receipt or chattel mortgage at the time of the original purchase from B.

L., having signed judgment against P., issued executions and caused the mortgaged goods to be seized thereunder. On the trial of an interpleader issue to try the title to the goods judgment was given in favour of B. for the goods originally sold to P., but not for those added in the mortgage. A Divisional Court held on motion to set aside this judgment, that the mortgage was

void for the inclusion of the goods not mentioned in the original agreement, and reversed the judgment at the trial in B.'s favour. This decision was affirmed by the Court of Appeal.

On appeal to the Supreme Court of Canada :—

Held, that the judgment of the Court of Appeal was right and should be affirmed.

Belcourt, for the appellant.

O'Gara, Q.C., and *Hick*, for the respondent.

QUEBEC.]

PONTIAC v. ROSS.

Municipal corporations—Aid to railway company—Debentures signed by warden de facto—44 & 45 V. c. 2, s. 19 (P. Q.)—Completion of line—Evidence of—Onus probandi on defendant.

A municipal corporation under the authority of a by-law issued and handed to the Treasurer of the Province of Quebec $50,000 of their debentures as a subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions on which the government provincial subsidy was payable under 44 & 45 V. c. 2, s. 19, viz: "When the road was completed and in good running order to the satisfaction of the Lieutenant-Governor in Council."

The debentures were signed by S. M., who was elected warden and took and held possession of the office after W. J. P. had verbally resigned the position.

In an action brought by the railway company to recover from the Treasurer of the Province the $50,000 debentures after the government bonus had been paid, and in which action the municipal corporation was *mise en cause* as a co-defendant, the Provincial Treasurer pleaded by demurrer only, which was overruled, and the county of Pontiac pleaded general denial and that the debentures were illegally signed.

Held, affirming the judgment of the Court below: 1st. That the debentures signed by the warden *de facto* were perfectly legal.

2nd. That as the Provincial Treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieutenant-Governor in Council, the onus was on the municipal corporation *mise en cause* to prove that the govern-

ment had not acted in conformity with the statute ; STRONG, J., dissenting.

Langelier, Q.C., and *McDougall*, for the appellant.

Irvine, Q.C., and *D. Ross*, Q.C., for the respondent.

PIGEON v. RECORDER'S COURT.

Constitutional law—37 V. c. 51, s. 123, s-ss. 27 and 31 (P. Q.)—Intra vires—Prohibition—By-law respecting sale of meat in private stalls—Validity of.

The council of the city of Montreal is authorized by s-ss. 27 and 31 of s. 123 of 37 V. c. 51 to regulate and license the sale, in any private stall or shop in the outside of the public meat markets, of any meat, fish, vegetables, or provisions usually sold on markets.

Held, affirming the judgment of the Court below, that the sub-sections in question are *intra vires* of the Provincial Legislature, and that a by-law passed by the city council under the authority of the above-named sub-sections fixing the license to sell in a private stall at $200 is valid.

Geoffrion, Q.C., and *Madore*, for the appellant.

Ethier, for the respondent.

HARDY v. FILIATRAULT.

Riparian owners—Demolition of dam—"Transaction"—Arts. 1918, 1920 C. C.—Report of expert—Motion to hear further evidence.

In an action brought by a riparian owner asking for damages and the demolition of a second dam built by another riparian owner in contravention of the terms and conditions of an agreement, made between the parties while a judgment ordering the demolition of the first dam was pending in appeal, the Superior Court appointed a civil engineer as expert, who reported that the second dam did not injure the plaintiff's property. The Superior Court subsequently rejected a motion made by the plaintiff asking to examine the expert to explain his report, and dismissed the action with costs. This judgment was confirmed by the Court of Queen's Bench for Lower Canada (Appeal side), and on appeal to the Supreme Court of Canada it was

Held, per FOURNIER, GWYNNE, AND PATTERSON, JJ., that the provisions of Arts. 1918 and 1920, C. C., under the title of "Transaction" were applicable to the agreement made in respect to the first dam, and that there was sufficient evidence in the case to dispose of the action by a judgment for the plaintiff.

RITCHIE, C. J., and TASCHEREAU, J., dissented.

PATTERSON, J., said that, as the principal contention in appeal was that the case should be sent back to the Court of first instance for further evidence, he would agree with the dissenting Judges not to do more for the plaintiff.

The appeal was allowed with costs.

Laflamme, Q.C., for the appellant.

Geoffrion, Q.C., and *Beaudin*, for the respondent.

DAVIS v. KERR.

Tutor and minor—Loan to minor—Arts. 297, 298, C.C.—Obligation void—Personal remedy for moneys used for benefit of minor—Hypothecary action.

Where a loan is improperly obtained by a tutor for his own purposes and the lender, through his agent, has knowledge that the judicial authorization to borrow has been obtained without the tutor having first submitted a summary account, as required by Art. 298, C.C., and that such authorization is otherwise irregular on its face, the obligation given by the tutor is null and void.

The ratification by the minor after becoming of age of such obligation is not binding if made without knowledge of the causes of nullity or illegality of the obligation given by the tutor.

If a mortgage granted by a tutor and subsequently ratified by a minor when of age, is declared null and void, an hypothecary action brought by the lender against a subsequent purchaser of the property mortgaged will not lie.

A person lending money to a tutor, which he proves to have been used to the advantage and benefit of the minor has a personal remedy against the minor when of age for the amount so lent and used.

Laflamme, Q.C., for the appellant.

Hutchinson, for the respondent.

NOVA SCOTIA.] [9TH OCTOBER, 1888.

WYMAN v. IMPERIAL INSURANCE CO.

Fire insurance—Insurable interest—Mortgagee—Assignment of policy.

In 1877 T. held a policy of insurance on his property, which he mortgaged to W. in 1881, and an indorsement on the policy, which had been annually renewed, made the loss payable to W. In 1882 T. conveyed to W. his equity of redemption in the property, and a few months after at the request of W. an indorsement was made on the policy permitting the premises to remain vacant. The policy was renewed each year until 1885, when all the policies of the insurance company were called in and replaced by new policies, that held by W. being replaced by another in the name of T., to which W. objected and returned it to the agent, who retained it. The premiums were paid by W. up to the end of 1886.

The insured premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T., having the vacancy permit and an assignment from T. to W. indorsed thereon, and containing a condition not in the old policy, namely, that all indorsements or transfers were to be authorized by the office at St. John, N. B., and signed by the general agent there. The company having refused payment, an action was brought on the new policy against them, and the agent who first issued the policy to T. was joined as a defendant, relief being asked against him for breach of duty and false representations. The Supreme Court of Nova Scotia set aside a verdict for the plaintiff in such action, and ordered a new trial on the ground that his interest was not insured and that T. had no insurable interest to enable W. to recover on the assignment.

On appeal from such decision to the Supreme Court of Canada :—

Held, reversing the judgment of the Court below, 20 N. S. Reps. 487, that the company having accepted the premiums from W. with knowledge of the fact that T. had ceased to have any interest in the property, they must be taken to have intended to deal with W. as owner of the property, and the contract of insurance was complete.

Graham, Q.C., for the appellants.

Henry, Q.C., for the respondents.

[6TH MAY, 1890.

FORSYTH v. BANK OF NOVA SCOTIA.
In re BANK OF LIVERPOOL.

Insolvent bank—Winding-up Act—Appointment of liquidators—Discretion of Judge.

The liquidators appointed by a Judge of the Supreme Court of Nova Scotia to wind up the affairs of the insolvent Bank of Liverpool, were those nominated at the meeting of creditors called for that purpose according to the requirements of the Winding-up Act, R. S. C. c. 129. The Bank of Nova Scotia was one of the liquidators, and by a Judge's order the local manager at Halifax was appointed to act for the bank in such liquidation.

On appeal to the Supreme Court of Canada from the decision of the Supreme Court of Nova Scotia affirming the appointment of liquidators:—

Held, that a bank can be one of the liquidators of a bank under the Winding-up Act.

2. That the Act does not require the nominees of both creditors and shareholders to be represented on the board of liquidators, and the Judge having in his discretion appointed the representatives of one class only, such discretion should not be interfered with.

3. The appointment would not be overruled by an appellate Court unless it appeared that the Judge making it was clearly wrong in his law or that he acted under an evident mistake as to the facts.

C. W. Weldon, Q.C., for the appellants.

R. L. Borden, for the respondents.

NEW BRUNSWICK.] [14TH DECEMBER, 1889.

MARITIME BANK OF CANADA v. RECEIVER-GENERAL OF NEW BRUNSWICK.

Insolvent bank—Winding-up Act—Assets—Crown prerogative—Right of provincial government to exercise—Lien.

The government of New Brunswick, as creditors of the insolvent Maritime Bank of Canada, claimed a first lien on the assets of the bank as representing the crown in the province.

Held, reversing the judgment of the Supreme Court of New Brunswick, GWYNNE, J., dissenting, that the government was entitled to such lien: but

Held, also, STRONG and TASCHEREAU, JJ., dissenting, that the lien was to be exercised only after the note-holders were paid, the prerogative being postponed to the lien of the note-holders by virtue of the Bank Act, R. S. C. c. 120, s. 79.

This case was decided by STRONG, FOURNIER, TASCHEREAU, GWYNNE, and PATTERSON, JJ.

A. A. Stockton and *C. A. Palmer*, for the appellants.

Blair, A.-G., and BARKER, Q.C., for the respondents.

MARITIME BANK OF CANADA v. REGINAM.

Prerogative of crown—Insurance company—Money deposited in an insolvent bank—Lien for.

The Dominion Safety Fund Life Association, a mutual insurance society doing business in Canada, deposited $45,000 in the Maritime Bank of Canada at St. John, N. B., and sent the deposit receipt to the Receiver-General of the Dominion to hold as the deposit of the Association with the Government, as required by the Insurance Act, R. S. C. c. 124. The Maritime Bank having become insolvent, a claim was made by the Dominion Government for this sum of $45,000, and a further sum of $15,000 held on ordinary deposit in the bank by the Crown, to be recognized as crown moneys and entitled to a first charge upon the assets.

Held, affirming the judgment of the Supreme Court of New Brunswick, GWYNNE, J., dissenting, that the Dominion government, as representing the Crown in Canada, was entitled to a first lien upon the assets of the insolvent bank in respect to the said sum of $15,000, and that the lien was not taken away by the section of the Bank Act, R. S. C. c. 120, which gives note-holders a first lien on such assets, it not being competent for the Legislature to deprive the Crown of its prerogative except by express words to that effect. See The Interpretation Act, R. S. C. c. 1, s. 7, s-s. 46.

Held, also, reversing the judgment of the Court below, STRONG, J., dissenting, that the government could not claim such lien in respect of the sum deposited by the insurance association, it not

being public money, but held by the Crown merely as trustee for the society.

The Judges deciding this case were RITCHIE, C.J., and STRONG, TASCHEREAU, GWYNNE, and PATTERSON, JJ.

A. A. Stockton and *C. A. Palmer*, for the appellants.

Weldon, Q.C., and *Barker*, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [13TH MAY, 1890.

BRADY v. SADLER.

Crown patent—Reservation—Evidence.

The description of the lands conveyed by a Crown patent was "All that parcel of land containing by admeasurement sixty acres, be the same more or less, being composed of lot number 9, exclusive of the lands covered by the waters of the S. river."

Lot 9 included, by metes and bounds, 200 acres, but the S. river ran through it. At and for some time previous to the time of the issue of the patent the waters of the S. river at this place were penned back by a dam.

Held, that the words "the waters of the S. river" did not mean the waters of the S. river flowing in its natural channel merely, or the waters at the height at which they might happen to be on the day of the issue of the patent, but had the effect of reserving from the grant that portion of the lot liable to be covered, owing to the existence of the dam, by the waters of the S. river at their natural height at any time during the ordinary changes of the seasons.

Held, also, that extrinsic evidence was admissible for the purpose of showing what was reserved under this description, and

that, upon that evidence, the land in question had not passed under the grant.

Judgment of the Queen's Bench Division, 16 O. R. 49, reversed.

F. Blake, Q.C., *S. H. Blake*, Q.C., and *T. Stewart*, for the appellants.

Robinson, Q.C., *Moss*, Q.C., and *H. O'Leary*, for the respondents.

CH. D.] [4TH MARCH, 1890.

McDONALD v. McDONALD.

Trusts and trustees—Executors—Acceptance of office—Purchase by trustee of trust property—Statute of Limitations.

The plaintiff and defendant were brothers, and their father, who died in the year 1846, appointed the plaintiff and two other sons of the testator his executors, and among other devises devised the land in question to the defendant. The testator had indorsed a note for the accommodation of the plaintiff, and after the testator's death the holders of this note sued the plaintiff and the two brothers as executors and recovered judgment against them. The land in question was sold under that judgment at a sheriff's sale, and was bought in by the plaintiff. The will had been registered, but had not been proved. Subsequently the plaintiff mortgaged the land in question and sold it subject to the mortgage. The mortgagees afterwards sold, and the plaintiff again bought in the land.

Held, that the plaintiff and his brothers, having defended the action on the note as executors, and judgment having been recovered against them as such, must be held to have accepted the office, and want of probate was immaterial, and the sheriff's sale was valid.

Held, also, that it being the plaintiff's duty to pay the note, he had not acquired title to the land for his own benefit at the sheriff's sale, but became a trustee for the devisee, the defendant, and that this trust revived when the plaintiff bought in the land for the second time.

Held, also, that, assuming that the plaintiff was not a trustee for the defendant and had no paper title, there was not, upon the

evidence, any possession of the land in question by the plaintiff sufficient to confer a title under the Statute of Limitations.

Judgment of the Chancery Division affirmed.

H. Symons, for the appellant.

Moss, Q.C., for the respondent.

[13TH MAY, 1890.

MACDONELL v. BLAKE.

Law Society—Bencher—"Retired Judge"—R. S. O. 1877 c. 138, s. 4—R. S. O. 1887 c. 145, s. 4.

A Judge of a Superior Court of the Province of Ontario, who, after his voluntary resignation of his office, before he has become entitled to a retiring allowance, has been accepted, resumes the active practice of his profession, is a "retired Judge" within the meaning of R. S. O. 1877 c. 138, s. 4, and as such is an ex officio Bencher of the Law Society of Upper Canada.

Judgment of the Chancery Division, 17 O. R. 104, affirmed; BURTON, J.A., dissenting.

J. Reeve, Q.C., for the appellant.

H. Cassels, for the respondent Blake.

A. H. Marsh, Q.C., and *Walter Read*, for the respondents the Law Society.

LEMAY v. CANADIAN PACIFIC R. W. CO.

Railways—Master and servant—Negligence—"Any person injured"—51 V. c. 29, s. 262, s-s. 3, (D).

A servant of a railway company is a "person" within the meaning of 51 V. c. 29, s. 262, s-s. 3 (D), and as such is entitled to recover damages if injured by the negligence of his employers.

Judgment of the Chancery Division, 18 O. R. 314, affirmed.

Robinson, Q.C., and *Shepley*, Q.C., for the appellants.

Delamere, Q.C., and *F. H. Keefer*, for the respondent.

TOWNSHIP OF BARTON v. CITY OF HAMILTON.

Municipal corporations—Extending sewer through contiguous municipality—"Territory"—R. S. O. c. 184, s. 492, s-s. 2.

The "territory" of the municipality referred to in R. S. O. c. 184, s. 492, s-s. 2, is the land comprised within the bounds

and under the jurisdiction of the municipality, and is not limited to lands that are the property of the municipality.

One municipality cannot therefore extend a sewer through lands within the bounds of a contiguous municipality, without the consent of the latter or without taking the statutory steps, even although the lands through which the sewer is to run have been purchased by the former municipality from the private owners.

Judgment of the Chancery Division, 18 O. R. 199, affirmed BURTON, J.A., dissenting.

Moss, Q.C., and *MacKelcan*, Q.C., for the appellants.

S. H. Blake, Q.C., and *W. Bell*, for the respondents.

ELECTRIC DESPATCH COMPANY OF TORONTO v. BELL TELEPHONE COMPANY OF CANADA.

Contract—Telephone company—Covenant not to transmit orders.

This was an appeal by the plaintiffs from the judgment of the Chancery Division, affirming the judgment of FALCONBRIDGE, J., reported 17 O. R. 495, heard before this Court on the 11th and 12th March, 1890.

Robinson, Q.C., and *Moss*, Q.C., for the appellants.

Lash, Q.C., and *S. G. Wood*, for the respondents.

The Court being divided in opinion, the appeal was dismissed with costs.

Per HAGARTY, C.J.O., and BURTON, J.A. — The covenant in question was broken, subscribers being enabled by the active intervention of the defendants to give orders of the kind referred to, to persons other than the plaintiffs.

Per OSLER and MACLENNAN, JJ.A.—The covenant was not broken, the defendants taking no active part in the transmission of the messages, but merely allowing subscribers to communicate with one another in the usual manner.

CUMBERLAND v. KEARNS.

Covenants for title—Local improvement rates—Incumbrances.

The defendant joined in a petition for local improvements, which were carried out and a rate therefor, payable in ten annual instalments but subject to commutation, was imposed upon the land benefited, including that of the defendant. Subsequently

the defendant sold the land to the plaintiffs and conveyed it to them by deed made in pursuance of the Act respecting Short Forms of Conveyances and containing the statutory covenants for title.

Held, affirming the judgment of the Chancery Division, 18 O. R. 151, that the rate was an incumbrance created in part by the action of the defendant, and that the plaintiffs were entitled to recover damages under the covenants, the amount recoverable being the smallest amount necessary to discharge the incumbrance.

Haverson, for the appellant.

J. H. Ferguson, Q.C., for the respondents.

BOYD, C.]

In re DINGMAN AND HALL.

Sale of land—Contract—Time for completion—Interest.

Wherein a contract for the sale and purchase of land the parties fix the time of payment of the purchase money, and the time for which interest thereon is to be computed, irrespective of the time fixed for completion, interest must, in the absence of actual misconduct on the part of the vendor, be paid from the time named notwithstanding the existence of difficulties as to title justifying the purchaser in refusing to complete until they are removed.

Judgment of BOYD, C., reversed.

Moss, Q.C., and *Rowan*, for the appellant.

S. H. Blake, Q.C. and *Kilmer*, for the respondents.

FERGUSON, J.] [5TH MARCH, 1889.

DAY v. DAY.

Fraudulent conveyance—Intent to defeat creditors—Secret trust—Evidence—Pleading.

If a defendant wishes to set up in answer to an action to declare him a trustee of land, the defence that the land was conveyed to him for a fraudulent purpose, he must in his pleading specifically say so and admit his own criminality in joining in a criminal act.

If the plaintiff can make out his case without disclosing the alleged fraud, the defendant will not be allowed to show as a

reason why the plaintiff should not recover, the fraud in which the defendant himself participated.

Judgment of FERGUSON, J., reversed.

Hardy, Q.C., for the appellant.

J. W. Bowlby, for the respondent.

ROSE, J.]

DANIELS v. NOXON.

Mortgage—Shares—Sale—Wilful neglect or default.

The defendant, who was mortgagee of certain shares in a manufacturing company, offered them for sale at auction, when one N. was declared the purchaser. The plaintiff, who was entitled to the shares subject to the defendant's claim, knew of and ratified the sale. The purchaser refused upon various grounds to carry out the sale, and no attempt was made by the defendant to compel completion of the contract. Subsequently the shares fell very much in value.

Held, BURTON, J.A., dissenting, that there was no duty cast upon the defendant to take proceedings against the purchaser to compel completion, and that he was not liable to account for the shares at the price that would have been realized had the sale been completed. The plaintiff could have paid the defendant's claim and then have herself taken proceedings against the purchaser, and not having done so was not entitled to complain.

Judgment of ROSE, J., affirmed.

McCarthy, Q.C., and *P. McPhillips*, for the appellant,

W. Cassels, Q.C., and *Ball*, Q.C., for the respondent.

STREET, J.] [14TH JANUARY, 1890.

McARTHUR v. NORTHERN AND PACIFIC JUNCTION RAILWAY COMPANY.

Railways—Constitutional law — Limitation of action—R. S. C. c. 109, s. 27 —Timber licenses — Interval between licenses —Trespass—Continuing damage—R. S. O. c. 28.

The defendants, a railway company incorporated by an Act of the Parliament of Canada, and subject to the provisions (among other provisions) of section 27 of the Railway Act of Canada, built their road through lands in the Province of Ontario, the fee

of which was in the Crown, but over which the plaintiffs had for three successive years held timber licenses issued by the Provincial Government. These licenses, giving the right to cut timber and exclusive possession in the usual form, were dated respectively the 5th of July, 1883, the 10th of December, 1884, and the 22nd of July, 1885, and each extended from its date to the 30th of the next April. The defendants entered upon the limits in question about the end of the year 1884, and the road was completed in July, 1886. In building the road the defendants cut down timber on the line, and also both within and outside of the six rod belts mentioned in the statute. No timber was cut after December, 1885. The plaintiffs brought this action on the 9th of September, 1886, to recover damages for the timber cut. It was admitted that as to timber cut outside the six rod belts they were entitled to recover, but it was contended that as to timber cut on the line and within those belts the action was barred. The defendants had filed their plan and book of reference, but they had not taken any of the statutory steps to acquire the interest of the plaintiffs.

Held, per HAGARTY, C.J.O., and OSLER, J.A., that the damage to the timber on the line and within the six rod belts was damage "sustained by reason of the railway" within the meaning of section 27 of R. S. C. c. 109, and that that section was *intra vires* the Dominion Parliament; that the plaintiffs were entitled to damages for the illegal occupation of the limits, and as consequent thereon to damages for all injury done during the illegal occupation; but that the plaintiffs had no title to the limits sufficient to maintain an action, either on legal or equitable principles, in the intervals between the licenses; that, therefore, the right of action was barred, except as to damages sustained during the currency of the last license, but was saved as to those by virtue of the occupation being illegal up to the 30th of April, 1886, less than six months before action.

Per BURTON, J.A., and MACLENNAN, J.A., that the section was *ultra vires* the Dominion Parliament as being an unnecessary interference with property and civil rights within the Province; but that, even if valid, would not avail for the protection of the defendants, as they were mere trespassers.

Per MACLENNAN, J.A., that even if the section were valid, and applied, the plaintiffs' were entitled to recover all the damages, the trespass having been a continuous uninterrupted one, and

the plaintiffs' right of renewal of their licenses being sufficient to enable them to recover, notwithstanding the intervals between them.

The Court being divided in opinion, the judgment of STREET, J., 15 O. R. 733, was affirmed.

W. Nesbitt, and *A. W. Aytoun-Finlay*, for the appellants.

S. H. Blake, Q.C., and *E. Martin*, Q.C., for the respondents.

Irving, Q.C., for the Attorney-General for Ontario.

C. C. YORK.] [13TH MAY, 1890.

HALL v. PRITTIE.

Assignment—Equitable assignment—Chose in action—Bills of exchange.

One E., who had a contract with the defendant for certain carpenter's work, gave to the plaintiff an order upon the defendant in the following form :—

"Please pay to H. the sum of $138.40 for flooring supplied to your buildings on D. Road, and charge to my account."

Held, that this was not an equitable assignment, but a bill of exchange, and that, in the absence of written acceptance by her, the defendant was not liable.

Judgment of the County Court of York reversed.

R. S. Neville, for the appellant.

Fullerton, Q.C., for the respondent.

In re HERR PIANO COMPANY.

CENTRAL BANK OF CANADA'S CLAIM.

Trusts and trustees—Breach of trust—Following trust moneys.

Three persons occupying a fiduciary position towards the bank became partners in the firm of H. & Co., agreeing to pay for their interests a certain sum of money in liquidation of creditors' claims. They did pay this sum, but out of moneys of the bank wrongfully appropriated by them. Subsequently the firm of H. & Co. was formed into a joint-stock company, and the assets of the partnership were assigned by the partners to the company.

The company soon afterwards failed, and a winding-up order was made, the original assets to a considerable extent coming into the possession of the liquidator.

Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the moneys brought in, and that no actual notice to them or to the company being shown, the bank had no lien.

Judgment of the County Court of York reversed.

J. K. Kerr, Q.C., and *R. S. Neville*, for the appellants.

W. R. Meredith, Q.C., and *F. A. Hilton*, for the respondent.

C. C. HASTINGS.]

BALDRICK v. RYAN.

Bills of sale and chattel mortgages—Affidavit of bona fides—Description of chattels—Concurrent mortgages.

The affidavit of *bona fides* in a chattel mortgage, taken to secure the mortgagee against his indorsement of two promissory notes, which was referred to in a recital, stated that the mortgage "were executed in good faith and for the express purpose of securing *me*, the said mortgagee therein named, against *his* indorsement of *a* promissory *notes* for (*sic*) or any renewal of the said recited promissory notes."

Held, that "his indorsement" might be read "my indorsement," as this was clearly a clerical error, but that even with this correction the clause remained vague and incomplete, and that the affidavit was therefore fatally defective.

Held, also, HAGARTY, C.J.O., dissenting, that the mortgagee was entitled to fall back on a previous mortgage covering the same chattels, given to secure him against his indorsement of certain notes, of one of which one of the two notes referred to in the later mortgage was a renewal, there being evidence that when the later mortgage was taken it was not intended to abandon the former one.

What is a sufficient description of chattels and animals, discussed.

Judgment of the County Court of Hastings varied.

T. Hislop, for the appellant.

G. A. Skinner, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 20th May, 1890.

In re RUSH.

Appeal—Divisional Court—Order of Judge under R. S. O. c. 133, s. 9.

Held, that an appeal does not lie to a Divisional Court from the order of a Judge of the High Court under s. 9 of R. S. O. c. 133, dispensing with the concurrence for the purpose of barring her dower of the wife of an owner of land, selling or mortgaging it free from dower.

Masten, for the appeal.

Kappele, contra.

MORAN v. KELLOGG.

Security for costs—Infant—Guardian—Next friend.

An infant cannot be required to give security for costs, nor can his guardian or next friend.

Re McConnell, 3 Ch. Chamb. R. 423, approved and followed.

J. R. Code, for the plaintiff.

R. S. Neville, for the defendant.

[Galt, C.J., 10th May, 1890.

ATTORNEY-GENERAL v. ÆTNA INSURANCE CO.

Interest—Fire insurance—Reference—Powers of referee.

In an action upon fire insurance policies a referee was directed to inquire, ascertain, and report the amount of the loss.

Held, having regard to the provisions of ss. 87 and 103 of R. S. O. c. 44, that the referee had authority to allow interest on the amount of the loss as ascertained by him.

Irving, Q.C., for the plaintiff.

W. B. Raymond, for the defendant.

[ROSE, J., 23RD APRIL, 1890.

STRETTON v. HOLMES.

Negligence—Mistake in compounding medicine—Physician—Druggist—Costs.

A physician wrote a prescription for the plaintiff and directed that it should be charged to him by the druggist who compounded it, which was done. His fee, including the charge for making up the prescription, was paid by the plaintiff. The druggist's clerk by mistake put prussic acid in the mixture made up pursuant to the prescription, and the plaintiff in consequence suffered injury.

Held, that the druggist was liable to the plaintiff for negligence, but the physician was not.

Under the circumstances of the case, no costs were awarded to or against any of the parties.

A. M. Taylor, for the plaintiff.

Garrow, Q.C., for the defendants.

[STREET, J, 1ST MAY, 1890.

GIBBONS v. McDONALD.

Bankruptcy and insolvency—Insolvent debtor—Mortgage to creditor—Preference—Notice or knowledge of insolvency—R. S. O. c. 124, s. 2.

A farmer mortgaged his farm for $600 to secure a debt of $571.50 due by him to the mortgagee, and the sum of $28.50 advanced at the time the mortgage was made. He knew at the time he made the mortgage that he was unable to pay his debts in full, and that he was giving the mortgagee a preference over his other creditors. The practical effect was that the mortgagee was paid in full and that the rest of the creditors received nothing. The mortgagee, however, was not aware at the time he took the mortgage that the mortgagor was in insolvent circumstances.

Held, following *Johnson* v. *Hope*, 17 A. R. 10, that the mortgage was not void against creditors, under s. 2 of R. S. O. c. 124.

Garrow, Q.C., for the plaintiff.

M. C. Cameron, for the defendant McDonald.

Mabee, for the defendant Heffernan.

ROSE v. TOWNSHIP OF WEST WAWANOSH.

Municipal corporations—By-law authorizing taking of gravel without specifying lands—Illegality—R. S. O. c. 184, s. 550, s-s. 8; s. 338—Injunction without quashing by-law.

By s. 550, s-s. 8, of R. S. O. c. 184, the council of every township is authorized to pass by-laws for searching for and taking such timber, gravel, stone, or other material or materials as may be necessary for keeping in repair any road or highway within the municipality.

Held, that the meaning of this section is that the council may, as necessity arises for their doing so, exercise the right to take gravel, etc., from any particular parcel or parcels of land, having first declared the necessity to exist and chosen and described the land from which the material is to be taken by a by-law; and therefore a by-law, purporting to be passed under this section, which authorized and empowered the pathmasters and other employees of the corporation to enter upon any land within the municipality when necessary to do so, save and except orchards, gardens, and pleasure-grounds, and search for and take any timber, gravel, etc., was upon its face illegal, because it purported to confer upon its officers wider and more extensive powers than the statute authorized.

Held, also, notwithstanding the provisions of s. 338 of R. S. O. c. 184, that the plaintiff was entitled without quashing the by-law to an injunction to restrain the defendants from proceeding to enforce the rights they claimed under this by-law, by entering upon his lands.

Garrow, Q.C., for the plaintiff.

M. C. Cameron, for the defendants.

[30TH MAY, 1890.

In re DAVIES AND COUNTY OF YORK.

Appeal—Special examiner—Time—Power of Master in Chambers to extend—Rules 485, 498, 846.

The corporation of the county of York appealed under Rule 498 from certain rulings of a special examiner in the course of the examination of persons upon a pending motion and cross-examination of deponents upon affidavits.

The appeal came in the first instance before the Master in Chambers, who held that he had no jurisdiction, but made an order extending the time for appealing to a Judge.

Upon the appeal coming on before STREET, J., in Court (at the same time as the main motion), *Ritchie*, Q.C., and *Ludwig*, for Davies, objected that it was too late, and that the Master in Chambers had no power to extend the time.

J. K. Kerr, Q.C., and *C. Millar*, for the appellants, contra., relied upon Rule 485 as giving the Master power to extend the time.

STREET, J., referred to the language of Rule 846 (b), and held that the Master in Chambers had no power to extend the time, and that the appeal not having been brought on within the time prescribed by Rule 846 (c), was too late.

Appeal dismissed. Costs to abide the result of the main motion.

CHANCERY DIVISION.

[FERGUSON, J., 30TH APRIL, 1890.

In re WARDELL and WILSON.

Vendor and purchaser—Power of sale in a mortgage—No notice required.

Upon an application under the Vendor and Purchaser Act, it appeared that the vendor was making title under a power of sale worded as follows: "Provided that the said mortgagees on default of payment for one month may without giving notice enter on and lease or sell the said lands." Default was made on the 17th January, and the mortgagor gave up possession to the mortgagee. Notice was given on the 18th January, and an abortive sale had on the 1st March, the reserve bid not being reached. On the 15th March an agreement for sale by private contract was made.

Held, that the vendor could make a good title.

N. McDonald, for the vendor.

W. B. Doherty, for the purchaser.

[ROBERTSON, J., 21ST APRIL, 1890.

In re FRANCES J. MOORE.

Moneys invested in Brazil—Application for leave to apply to foreign Court—Proceedings before same—Form of order.

A petition was presented on behalf of F. J. M. entitled to a sum of money, part of her father's estate, represented by Brazilian

bonds, her father having died in Brazil. The petitioner married when an infant in Prince Edward Island, but executed (by power of attorney) an ante-nuptial settlement in Rio de Janeiro approved by the Juiz de Orphaos (Court of Orphans) at that city. The fund was thereupon retained by the foreign Court until F. J. M. attained her majority. On application there for payment, the foreign Court refused to pay the money to the petitioner in consequence of the marriage settlement, which limited the fund to issue of the marriage subject to the mother's right to enjoy the income, but would pay money into an English Court having jurisdiction over the parties, and upon such Court granting leave to the petitioner to apply to have the fund converted and remitted to the English Court.

W. F. Burton moved upon petition for such an order as was required by the foreign Court, and for leave to apply to the Juiz de Orphaos in Rio de Janeiro to convert the securities and remit the money to this Province.

J. Hoskin, Q.C., for the infants, approved, but thought the order should be permissive, the terms to be approved by the foreign Court.

Order made, to be translated into the Portuguese language; the money if brought within the jurisdiction of the Court to remain there subject to further directions.

[STREET, J., 20TH MARCH, 1890.

DUGGAN v. LONDON AND CANADIAN L. & A. CO.

Assignment of shares of stock—"In trust"—Pledge by assignee—Redemption by owner.

The plaintiff assigned certain shares of stock to his brokers as security for advances, the assignment being made "in trust." The defendant company subsequently became the holders of the shares as security for advances (greatly exceeding in amount what was due by the plaintiff to the brokers) made to the brokers, by assignment from a holder who also held in trust. The company made no inquiry as to what, if any, trust existed, and the plaintiff had no notice that his stock was being so dealt with.

Held, that the plaintiff was entitled to recover his stock upon payment of the amount due by him to the brokers.

McCarthy, Q.C., and *Moss*, Q.C., for the plaintiff.

Arnoldi, Q.C., for the defendant company.

W. Cassels, Q.C., for the defendant Turnbull.

Ritchie, Q.C., for the defendant Scarth.

IN CHAMBERS.

[ROSE, J., 20TH MAY, 1890.

HUDSON BAY COMPANY v. HAMILTON.

Appearance—Notice of, where entered late—Judgment for default—Rule 281.

Judgment may be signed under Rule 281 for default of appearance where an appearance has been entered after the time limited, if notice has not been given as required by the Rule; and the knowledge of the fact that an appearance has been entered does not constitute such notice as the Rule requires.

Smith v. *Dobbin*, 3 Ex. D. 338, followed.

Lanark & Drummond Plank Road Co. v. *Bothwell*, 2 U. C. L. J. O. S. 229, not followed.

A. C. Galt, for the plaintiffs.

[ROBERTSON, J., 29th APRIL, 1890.

In re INGOLDSBY.

Will—Execution—Construction—Election under Devolution of Estates Act.

B. I. died intestate 15th June, 1889. His wife died 31st August following, having made her will on the 28th August, in which she elected to take a distributive share of her husband's estate in lieu of dower.

Held, that, although the will must be construed to speak as if executed immediately before the death in regard to the real and personal estate comprised therein, it took effect and became operative immediately after its execution in regard to the declaration of election, and that such declaration was a good election under s. 4, s-s. 2, of the Devolution of Estates Act.

McKechnie, for the executor of the widow.

J. Hoskin, Q.C., for the infants.

[STREET, J., 30TH MAY, 1890.

In re YOUNG AND LONDON AND ONTARIO INVESTMENT CO.

Costs—Taxation—Exercising power of sale in mortgage— Costs of notices of sale—Provision for sale without notice.

Upon taxing the costs of the company of exercising the power of sale in their mortgage, S. B. Clark, taxing officer, disallowed

the costs of serving notices of sale, the power having been exercised more than three months after default, and the mortgage providing that after three months' default the mortgagees might sell without any notice.

The company appealed from this ruling.

T. P. Galt, for the appeal.

Du Vernet, contra.

STREET, J., held that the mortgagees had the right to proceed after three months' default to sell with notice if they so desired, notwithstanding that there was power to sell without notice, and that they were entitled to tax their costs of the notices.

Appeal allowed with costs.

In re SMITH v. GRANT.

Prohibition—Division Court—Increased jurisdiction—Ascertainment of amount.

An action was brought in the 4th Division Court of the county of Carleton to recover $150.78, for money had and received. The plaintiff relied upon the following document, signed by the defendant, as ascertaining the amount, so as to bring it within the increased jurisdiction of the Division Court :—"Good to Sam Smith on presentation in person, $150.78, during the summer or autumn of 1884, as per amount deposited with me."

Aylesworth, for the defendant, moved for prohibition to the Division Court, on the ground that the amount was not ascertained, and the Court had, therefore, no jurisdiction, relying on *McDermid* v. *McDermid*, 15 A. R. 287 ; *Moses* v. *Moses*, 13 P. R. 12, 144 ; and cases cited in these decisions.

Masten, for the plaintiff, contra, relied especially upon *Re Graham* v. *Tomlinson*, 12 P. R. 367.

STREET, J., refused the motion with costs, distinguishing *McDermid* v. *McDermid*, upon the ground that in the present case the acknowledgment was given after the liability had accrued—that it was an acknowledgment of an existing liability; and following *Re Graham* v. *Tomlinson* in preference to *Moses* v. *Moses*, if the latter were inconsistent with this decision.

NEW BRUNSWICK.

In the Supreme Court.

[APRIL, 1890.

BYRAM v. JOHNSTON.

Justice's Court — Confession of judgment on promissory note — Subsequent arrest on note—Action for malicious arrest and false imprisonment—Merger.

The plaintiff gave his promissory note to C., who sent it to the defendant, his agent at Fredericton, and the defendant in turn sent the note to his agent at Woodstock, N. B. It was afterwards forwarded to a justice of the peace in Madawaska county, where the plaintiff resided, for collection, and the justice sued the plaintiff in C.'s name on the note. On receipt of the summons the plaintiff wrote a postal card to the justice acknowledging the debt. Neither party appeared on the return day at the trial, and the justice entered a judgment for C. on the note. Subsequently the note was returned to the defendant at Fredericton, who caused the plaintiff to be arrested on a capias issued by the police magistrate of that city. The plaintiff now brought an action for malicious arrest and false imprisonment against the defendant, and on the trial the jury, after answering certain questions submitted to them, were directed by the trial Judge to find a verdict for the defendant, which they did, and from this verdict an appeal was taken to this Court, and a motion made for a new trial.

Held, WETMORE, J., dissenting, that the note was not merged in the judgment before the justice, and that the Courts of justices of the peace, created by statute in this Province are not Courts of record, and their judgments do not import absolute verity.

Young v. *Woodcock*, 3 Kerr 554, followed.

Held, also, that the defendant could not be held liable for false imprisonment and malicious arrest, because the note was not merged in the judgment, and because the capias was good on the face of it, and there was a sufficient affidavit to justify it, as all the defendant had to do was to make the affidavit and instruct his attorney to issue the capias; and also because the

plaintiff unquestionably owed the debt for which he was arrested, the original debt on the note not having been merged in the judgment.

H. B. Rainsford, for the plaintiff.

J. A. Vanwart, for the defendant.

GILBERT v. McDONALD.

County Courts—Jurisdiction of—Writ for service outside the Province—Issued in Supreme Court—Costs.

The defendant resided outside the Province, and a writ of summons had been issued in the Supreme Court, under s. 15, Consol. Stat. c. 37, and judgment for $22 recovered. Application was then made to WETMORE, J., to certify costs, and he referred the matter to the Court.

Held, that the writ, being for service outside this Province, was properly issued, and that the plaintiff was entitled to have Supreme Court costs taxed on his judgment without any certificate.

C. J. Coster, for the plaintiff.

H. H. McLean, for the defendant.

COLLINS v. CITY OF PORTLAND.

Negligence—Action for killing child—No evidence of damage—Non-suit.

Action against the city for killing the plaintiff's child. At the trial it appeared that the child was very young and no evidence was given showing the plaintiff had suffered any damage from the loss of the services of her child, except those incurred by the funeral expenses and burial. The Judge directed a non-suit to be entered, and a motion for a new trial on the ground of misdirection was refused.

L. A. Currey, for the defendant.

A. J. Trueman, for the plaintiff.

DRISCOLL v. MAYOR, ETC., OF ST. JOHN.

Negligence—Non-suit—Misdirection—New trial—Evidence.

This was an action brought against the corporation for alleged negligence in not keeping a street in repair, owing to which the

plaintiff was severely injured by a fall. The evidence of negligence was slight, some saying that the place where the accident occurred was always dangerous when there was ice on it, etc. The Judge at the trial directed a non-suit to be entered. A new trial was moved for on the ground of misdirection.

Held, that as there was some evidence of negligence, the Judge did wrong in directing a non-suit to be entered, and should have left it to the jury to determine whether there was negligence or not.

Skinner, Q.C., and *G. H. Lee*, for the plaintiff.

J. A. Jack, for the defendants.

SANCTON v. READ.

Parties—Mortgage suit—Foreclosure—Executors of mortgagee—Heirs o mortgagee.

One Owens, the mortgagee of certain land, died leaving a will by which the property was devised to his executors. The executors, to carry out the terms of the will, found it necessary to transfer the mortgage to a third party, who immediately sold it back to them.

Held, that the legal title by the will and sale passed to the executors, and it was not necessary that the heirs of the morttgagee should be made parties to a suit for foreclosure.

C. A. Palmer, for the plaintiff.

Barker, Q.C., and *Forbes*, for the defendant.

CHRISTIE v. CITY OF PORTLAND.

New trial—Judge directing juror to stand aside—Notice of action.

Upon a motion for a new trial the grounds were that the defendants should have had notice of action before the suit was commenced, and also that the Judge had no power to direct a juror to stand aside when not challenged by either party. It appeared that on the trial the Judge had directed a juror, who was a resident of the city of Portland, to stand aside until the remainder of the panel was exhausted, without being challenged by the plaintiff or defendant or any objection raised to his sitting.

Held, that a notice of action was not necessary before commencing suit.

Held, also, that the Judge had no power to direct the juror to stand aside without being challenged, and that a new trial should be granted.

Pugsley, S.-G., for the plaintiff.

L. A. Currig, for the defendant.

SIMONDS v. SELKIRK MINING CO.

Company — Service outside the province — Consol. Stat. c. 37, s. 15, not applicable.

Consol. Stat. c. 17, s. 15, enacts "In case any defendant, being a British subject, in a suit to be brought in the Supreme Court, is residing out of the jurisdiction of the Court, the plaintiff may issue a writ of summons . . . . which writ shall bear indorsement . . . purporting that such writ is for service outside the jurisdiction of the Court." . . .

The writ had been issued and served on a person alleged to be the president of the defendant company outside the province, and the plaintiff applied for leave to proceed under the above section.

Held, that the provisions of the section were not applicable to corporations.

C. F. A. Simonds, for the plaintiff.

ISAACS V. GROTHE.

Bill of exchange—Signature struck out—Maker not liable on the face of it.

The defendant made a draft payable to his own order, which he indorsed. The draft was afterwards in a bank, and the defendant's name was struck through or scored out. When payment was demanded the defendant did not deny the draft, but replied that he had made an assignment of all his property and could not pay.

Held, that on the face of the draft there was no liability, and without some evidence to them how the signature had been struck out, the plaintiff could not recover.

C .A. Macdonald, for the plaintiff.

C. A. Stockton, for the defendant.

MOORE v. PRESCOTT.

Trover—Action by joint owner of chattel—What evidence admissible in trover under plea of not guilty.

This was an action of trover for a horse, brought in the County Court for York County. W. G. Moore and his brother, Charles Moore, purchased a horse as their joint property in July, 1886, and used it as such until it was seized by the defendant Prescott, a constable, under an execution issued out of a justice's Court against Charles Moore, in whose possession the horse then was. Prescott sold the horse as the sole property of Charles Moore. W. G. Moore, the plaintiff, claimed the horse as his sole property under an alleged sale to him of his brother's interest made several months before the seizure by Prescott, but the jury found that the alleged sale was not *bona fide* and gave a verdict for the plaintiff for half the value of the horse. An application was made to the County Court Judge for a new trial, on the ground that one joint owner could not maintain trover against the other. The Judge refused the application, and his decision was appealed from.

Held, that the action of trover would not lie.

Another question was whether a judgment obtained in a justice's Court against Charles Moore and an execution issued thereon, and under which Prescott sold the horse, was admissible in evidence under the plea of not guilty in this action.

Held, that the judgment and execution were admissible, as under the old rule of pleading, which still obtained in the County Courts, the plea of not guilty in trover put in issue both the plaintiff's property in the goods and the defendant's conversion of them. The defendant was allowed not only to contest the truth of the declaration, but (with certain exceptions not applicable here) any matter of defence which tended to show that the plaintiff had no right of action.

McCatherine v. Lewis, 25 N. B. Reps. 429, followed.

J. A. Vanwart, for the plaintiff.

A. J. Gregory, for the defendant.

Ex parte GRIEVES.

Canada Temperance Act—Summary conviction—Disqualification of magistrate—What amounts to—Witness a cousin—Information—Collector of inland revenue—Amending Act, 1888—Previous offences—Defendant's presence not necessary at conviction—Municipalities—Evidence of keeping for sale—Third offence.

Grieves was convicted before the police magistrate of Fredericton in April, 1889, for a third offence of keeping intoxicating liquor for sale, contrary to the second part of the Canada Temperance Act.

A rule *nisi* to quash the conviction was granted on the following grounds :—

1. That the police magistrate was disqualified from trying the complainant, one Wesley Nichol, a witness for the prosecution, being a cousin of the police magistrate.

2. That the prosecution should have been laid in the name of the collector of inland revenue.

3. That the second part of the Canada Temperance Act had been amended by the Act 51 V. c. 34, passed in 1888, and therefore that any conviction made before the Act was amended would not be evidence to prove previous offences.

4. That s. 111 only applied to municipalities.

5. That the defendant could not be convicted for a third offence unless he was present at the Court at the time.

J. A. Vanwart supported the rule.

George F. Gregory and *J. W. McCready* showed cause.

ALLEN, C.J.—The question of the police magistrate's qualification to try the case is the most important one. The information was laid by one of the policemen of Fredericton at the request of William McFarlane and Wm. T. L. Reed, one or both of them. Reed informed the policemen at the time that counsel would be employed to conduct the prosecutions and that he (Reed) would provide the funds for the purpose; and counsel did attend and conduct the prosecutions. It appeared that a number of persons, calling themselves "The Star Council of Royal Templars of Temperance," were associated together for the purpose of enforcing the C. T. Act in Fredericton; that McFarlane, Reed, and Wesley Nichol and others were members of the council; and that after the informations in this and several other cases were laid a committee of the council was

appointed to raise funds to carry on the prosecutions. Nichol was not one of the committee, but Reed furnished him with money to buy spirituous liquor in houses where it was supposed to be sold in order that he might prove the sales. He accordingly purchased liquor in the defendant's house and in several other places. It did not appear that Nichol was present at the meeting when the committee was appointed. He had intended to lay the information against the defendant and several other persons for illegal sales, but after consultation with Reed, it was considered better that the informations should be laid by a policeman.

The first question to be determined on this branch of the case is whether Nichol was substantially one of the prosecutors in this case. As a member of the Star Council I would say that probably he was, though as he does not appear to have been one of the committee appointed to carry on the prosecutions, he may not have contributed anything to the fund which, it may fairly be presumed, was raised for the purpose. At all events there is nothing to show that he could in any way be made liable for the costs in case the police magistrate had dismissed the information.

The mere fact of Nichol being a cousin of the magistrate would be no ground of his disqualification to try the informations.

Questions of disqualification of justices to try complaints on the ground of interest or bias are not uncommon in England. In the case of *Reg.* v. *Rand*, L. R. 1 Q. B. 230, it was laid down that, though any pecuniary interest, however small, in the matter, disqualified a justice from acting in a judicial inquiry, the mere possibility of bias in favour of one of the parties does not *ipso facto* avoid the justice's decision; in order to have that effect, the bias must be shown to be at least real. And Blackburn, J., said: "Whenever there is a real likelihood that the Judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong for him to act; and we are not to be understood to say that where there is a real bias of this sort the Court would not interfere; but in the present case there is no ground for doubting that the justice acted perfectly *bona fide*; and the only question is whether in strict law, under such circumstances, the certificate of such justices is void, as it would be if they had a pecuniary interest,

and we think that *Reg.* v. *Dean of Rochester*, 17 Q. B. 1, is an authority that circumstances from which a suspicion of favour may arise do not produce the same effect as a pecuniary interest."

It is unnecessary to go through the cases cited on the argument on this point. They establish the principle that where the interest of a justice in a matter in which he has taken part is not pecuniary, it must be a substantial interest, so as to make it likely that he had a real bias; that the mere possibility of bias is not enough to disqualify him.

Applying these principles to the present case, I am unable to see that the relationship existing between Nichol and the magistrate was sufficient to bias him in his judgment, or was likely to prejudice the defendant in the decision of the matter; at most, I think it was only a possibility of bias, which is not enough to disqualify him. If it had appeared that Nichol could have been made liable for costs in case the prosecution failed, perhaps the conclusion might have been otherwise.

The case of *Reg.* v. *Simmons*, 1 Pugs. 158, is distinguishable, for there the justice who tried the case was a member of the Division of Sons of Temperance by whom the prosecution was carried on; he was virtually one of the prosecutors. It resembles the case of *Reg.* v. *Lee*, 9 Q. B. D. 394.

I think there is nothing in the second objection. Section 101 of the C. T. Act declares that prosecutions under the second part of the Act may be brought by or in the name of the collector of inland revenue in whose official division the offence was committed, "or, by or in the name of any person." A similar objection was taken but not decided in *Reg.* v. *Dibblee*, 23 N. B. Reps. 30. The right to lay an information is clearly not confined to the collector of inland revenue.

I cannot find anything in the Act 51 V. c. 34 amending the C. T. Act to support the third objection. The conviction was under s. 99 of the C. T. Act, which prohibits the keeping for sale or selling intoxicating liquor; and s-s. 4 excepts from the operation of the section sales of intoxicating liquor for medicinal purposes, or for use in some art, trade, or manufacture made by licensed druggists or vendors. This sub-section was repealed by the 51 V. c. 34, s. 5, which substitutes provisions respecting the sales of liquor for medicinal purposes, or for use in trade or manufacture, differing from those in the repealed sub-section 4; but I cannot see how this amendment, or the provisions of s. 11 of

51 V. c. 35 affect the present case, where the conviction is for keeping intoxicating liquors for sale. If the defendant was authorized to sell under s.-s. 4, that was a matter of defence.

Another objection to the conviction was that as the second part of the C. T. Act had been amended, any convictions made before the amendment could not be used to prove previous offences committed by the defendant; that any offences since the passing of the amending Acts (1888) could not be connected with offences committed before the amendment so as to establish a second or third conviction; but that the conviction must commence *de novo*, after the passing of the amending Acts; consequently the present conviction should only have been for a first offence.

The 51st sub-section of s. 7 of the Interpretation Act was referred to by the defendant's counsel in support of his views. It enacts as follows: "Whenever any Act or part of an Act is repealed, and other provisions are substituted by way of amendment, revision, or consolidation, any reference to any unrepealed Act or in any rule, order, or regulation made thereunder to such repealed Act or enactment shall, as regards any subsequent transaction, matter, or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject matter as such repealed Act or enactment." This section seems to me somewhat obscure. At all events I do not see that it affects any of the questions in this case.

The conviction for a third offence was under s. 115 of the C. T. Act, s-s. (f), which declares as follows: "If any person who has been convicted of a violation of any provision of the second part of this Act is afterwards convicted of an offence against such provision or against any other provision of the second part, such conviction shall be deemed a conviction for a second offence, within the meaning of section 100 of this Act, and may be dealt with and punished accordingly, although the two convictions may be for acts of different descriptions; and if any such person is afterward again convicted of a violation of any provision of the second part, whether similar or not to the previous offences, such conviction shall, in like manner, be deemed a conviction for a third offence, within the meaning of section 100 of this Act, and may be dealt with and punished accordingly."

This section is not altered in any way by 51 V. c. 34. It is, therefore, immaterial whether the previous offences were of a

similar character with the offence charged in this present case, provided they are all offences against the second part of this Act.

Another objection was taken that the defendant could not be convicted of illegally keeping liquor for sale, merely by evidence of the existence of a bar, counter, kegs, and other appliances usually found in taverns, because the 111th section of the Act only applies to municipalities where the Act was in force, and not to cities. Admitting that this may be the proper construction of the section, I do not think this objection is a valid one in this case, because here the prosecution proved not only the existence of a bar, counter, glasses, bottles, etc., but the actual sale of intoxicating liquor in the house occupied by the defendant. The section makes the existence of the appliances *prima facie* evidence that liquor is kept there for illegal sale and puts the burthen of disproving that it is so kept on the defendant. But where evidence of the fact of sale is proved by the prosecution, the presumption which would be raised by proof of the facts stated in the 111th section, need not be, and in fact is not, relied upon. Selling or keeping intoxicating liquor for sale is an offence under the 99th section of the Act; and evidence of an actual sale is certainly sufficient to sustain a conviction for keeping for sale.

The remaining objection is disposed of by the case of *Ex parte Groves*, 23 N. B. Reps. 38, in which a majority of the Court held that where a defendant appeared by attorney he could be convicted of a second offence under the Act (and the same rule would apply to a third offence), though he was not personally present to answer the question whether he had been so previously convicted. In this case the defendant's attorney was asked the question and denied the previous convictions. I think none of the objections to the convictions are sustained, and that the rule should be discharged.

KING and TUCK, JJ., concurred.

WETMORE, J., dissented.

PALMER and FRASER, JJ., took no part.

Rule discharged.

[3RD MAY, 1890.

SMITH v. BUCK.

Protection of sheep—Declaration—Demurrer—Not necessary to allege scienter on part of defendant—Consol. Stat. c. 111.

This was an appeal from the decision of a Judge of a County Court. Consol. Stat. c. 111 enacts: "If any dog shall maim or kill a sheep or a lamb, the owner of the dog, upon conviction before a justice, shall cause the dog to be immediately killed. * * * The owner of any sheep or lamb so maimed or killed may recover the damage sustained from the owner of the dog; if such damage amount to or be less than twenty dollars, before any justice, with costs, and if such damage exceed twenty dollars before any Court of competent jurisdiction, with costs."

The action was brought in the County Court to recover damages for the loss of sheep killed by the defendant's dog. The declaration did not allege any propensity the dog had for killing sheep, or that the defendant had any knowledge of such propensity, and was demurred to on these grounds. The County Court Judge allowed the demurrer, and this was an appeal from his decision.

Held, that the evident intention of the statute was to enlarge the common law liability of the owners of dogs, and it was not necessary to allege scienter on the part of the defendant.

A. B. Connell, for the defendant.

J. A. Vanwart, for the plaintiff.

RYAN v. LEWIS.

Election petition—Consol. Stat. c. 5—What petition should show—Returning through sheriff's office.

This was an appeal from the decision of the Albert Election Court Judge dismissing certain objections taken to the petition filed against the return of the members for that county. The points raised were:—

1. That the petition should show on its face that it was filed within 21 days after the making of the return of the election to the Clerk of the Crown in Chancery.

2. That the petition should be returned through the office of the sheriff of the county.

Held, that inasmuch as Consol. Stat. c. 5 laid down a form of petition, it was not necessary that the petition should show that it had been filed within the time limited by the statute, but if it had not been so filed, the proper course would be to apply to have it struck from the files of the Court; also, that it was not necessary that the petition should be returned through the office of the sheriff of the county.

H. A. Powell, for the applicants.

HALIFAX BANKING CO. v. SMITH.

Evidence—Admissibility of—Signing bond under duress—New trial.

The plaintiffs held a note for $18,000, made by A., and indorsed by four of his brothers, and brought an action against the indorsers. The defendants claimed that their names had been forged. Just before the case was to be tried the parties and their attorneys all met, and a settlement was effected by which the defendants gave and the plaintiffs accepted a bond and mortgage for an amount considerably less than that of the note. The defendants did not pay the bond, and the bank brought this action upon it. The defence set up was that the defendants were induced to execute the bond by undue influence and by threats that if they did not sign the bond, the bank would prosecute their brother for forgery in case they denied their signatures on the first trial. The evidence of the defendants' attorney was admitted, who stated that he was present at the time the settlement was effected, and that he believed the signatures of the indorsers on the note were genuine.

The plaintiffs recovered a verdict, and this was a motion for a new trial.

Held, by WETMORE, KING, and TUCK, JJ., (ALLEN, C.J., and PALMER, J., dissenting), that the evidence was inadmissible, and that there should be a new trial.

Hanington, Q.C., *McLeod*, Q.C., and *C. A. Palmer*, for the plaintiffs.

Blair, A.-G., for the defendants.

OCEAN INSURANCE CO. v. PALMER.

Marine insurance—Promissory note—Right of company to hold—Reducing valuation—Proof of incorporation.

This was an action on a promissory note given by the defendant to pay an insurance premium on a vessel. The defendant

made an application to the plaintiffs' agents in St. John for an insurance on certain shares of a vessel owned by him, and which he valued at $16,000. The application was forwarded to the head office, accepted, and a policy issued and sent to the St. John agents, but which was not delivered to the defendant. There was also a concurrent policy in the Phœnix Company. Subsequently to making the application the defendant discovered he had over-valued his interest in the vessel, and asked to have the valuation reduced to $12,000. The Phœnix Company consented to this reduction, but the plaintiffs would not do so, and on the refusal being made known to the defendant, he asked the agents what could be done about it now. They replied, "We, or they (the company) will cancel it." The defendant in his evidence could not say whether the agents meant they would cancel the policy or the head office would do it. A verdict was found for the plaintiff, which was appealed from.

The objections taken were :—

1. That there was not sufficient proof of the incorporation of the company. The certificate of incorporation should have attached the seal of the United States, and not that of the State of Maine.

2. That the company had no right to take a note.

3. That the policy if issued was afterwards cancelled.

Held, that the proof of the incorporation was sufficient, and that there was no doubt about the right of the company to hold a note and bring an action on it, and that the jury having found that the policy was not cancelled, the verdict would not be disturbed.

Geo. B. Seeley, for the plaintiffs.

E. McLeod, Q.C., and *C. A. Palmer*, for the defendant.

IN CHAMBERS.

(EQUITY SIDE) [PALMER, J.

CANADIAN EXPRESS CO. v. RAY.

Money sent by express—Claimants—Who entitled to it.

Application for an injunction to restrain proceedings against the plaintiffs, and for directions as to the disposal of the sum of $500 sent from Moncton by one David Taylor to a Mrs. M. E. Sneden, in St. John. The plaintiffs were unable to find anybody

of the name and still held the money. Taylor, who sent the money, claimed it, and also the defendant, as administrator of the estate of Martha Ray, on the ground that she was sometimes known under the name of Mrs. M. E. Sneden.

PALMER, J.—It appears by the bill and proofs in this case that the $500 in the hands of the Canadian Express Company is so in their hands without their having any claim to it whatever; and it being their duty to deliver it to whoever has the legal right to it, and they having come into Court and having by their counsel stated they were perfectly willing to abide by the order of the Court, and the money having been brought into Court for the purpose of being given to such party as the Court may decide is entitled to it, it is therefore clear that they ought not to be further vexed in the matter, and that the right to it should be tried out between the claimants. In the meantime I will restrain any further action against these plaintiffs, upon the money being handed to the Clerk, who shall deposit it in the Bank of N. B. subject to the order of this Court.

J. G. Forbes, for the plaintiffs.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

McRAE v. CORBETT.

Tax sales—Liability of lands to sale—Furnishing lists to clerks—Method of sale—Sale for nominal price—Illegal addition to amount—Name of corporation—Adoption of seal—Onus of proving invalidity—Bill attacking void transaction.

1. Lands were by virtue of the local statutes liable in 1885 to be sold for taxes.

2. Furnishing to the municipal clerks lists of lands in arrear under s. 272 of the Act of 1883, and s. 289 of the Act of 1884, is not a condition precedent to the sale of lands for taxes.

Per DUBUC, J.—Any such objection would be cured by the Act of 1886, s. 673, as amended by the Act of 1887, s. 52.

3. Under the Act of 1884 the treasurer, in selling lots not divided into legal subdivisons, should determine whether,

having regard to the interest of both owner and municipality, he will offer the whole parcel of land or some definite part. Having so determined, he should sell for the highest price obtainable. He is not, however, "bound to inquire into, or form any opinion of the value of the land." And not having done so forms no reason for avoiding the sale.

4. Land worth $700 was sold for taxes for the sum of $17. The evidence showed however that there was great difficulty in selling lands at all.

Held, that the facts did not show that the sale was not conducted in a fair, open, and proper manner.

5. The amount for which lands were sold for taxes was illegally increased by the addition of interest.

Held, not to invalidate the sale.

6. The use of a seal as the corporate seal with the knowledge and tacit consent of the governing body is a sufficient adoption of it.

Per DUBUC, J.—A variation from the precise name of the corporation in a grant or obligation by or to it, is not material, if the identity of the corporation is unmistakable, either from the face of the instrument or from the averments and proof.

Per KILLAM, J.—1. In a suit attacking a tax sale deed the onus of proving its validity is upon the plaintiff.

2. The municipality of Kildonan was not dissolved by the Municipal Act of 1886.

3. A bill to set aside a tax sale deed alleged that the official who conducted the sale had no authority to do so; and that the deed was not executed by the officers or under the seal of the proper municipal corporation.

Quære, whether it thus appearing that the deed was wholly void, a bill would lie to have it so declared.

[TAYLOR, C.J.

REGAN v. WHELAN.

Tax sales—Unpatented lands.

G. purchased land from the Crown in 1879, but no patent issued until September, 1881.

Held, that the land was liable to taxation, save in so far as Her Majesty was concerned, during the years 1880 and 1881; and could be sold for non-payment.

A statute provided that "all lands heretofore sold for . . . taxes . . . shall become absolutely vested in such purchasers . . . unless the validity thereof has been questioned . . . before the 1st of January, 1885." This statute was repealed, but all rights acquired under it were to remain valid.

Held, that the tax purchaser's title could not be questioned in proceedings commenced after the 1st January, 1885.

REGINA v. BIBBY.

Criminal law—Veterinary surgeon—Questions raised upon certiorari—Waiver of irregularities by appearance—Imposition of unwarranted costs.

B. was convicted of practising as a veterinary surgeon without the proper qualifications.

Held, that the conviction was good, although it did not allege any particular act done.

An objection of *res judicata* cannot be urged upon *certiorari* if not taken before the magistrate.

The absence of a formal adjournment of the proceedings before a magistrate may be waived by subsequent appearance.

A conviction stated the offence to have been committed in the county of Norfolk. The information charged the offence as in the municipality of North Cypress, in the county of Norfolk, in the Province of Manitoba. By statute the municipality of North Cypress was in the county of Norfolk. In the absence of any affidavit denying that the magistrate had jurisdiction,

Held, that an objection that no offence within the Province had been shown was untenable.

Costs unwarranted by statute having been imposed,

Held, that the conviction was bad.

[BAIN, J.

ROBERTSON v. CITY OF WINNIPEG.

Demurrer—Plea to several counts, one of which is good.

Where a plea is pleaded to several counts or breaches, and is bad as to some of them, it is bad altogether, and it cannot be construed distributively under the C. L. P. Act.

Supreme Court of Canada.

ONTARIO.] [12TH JUNE, 1890.

JACKSON v. CANADA SOUTHERN RAILWAY COMPANY.

Railway company—Negligence—Accident to emp'oyee—Performance of duty—Contributory negligence—Workmen's Compensation for Injuries Act.

J., a switch-tender of the defendants, was obliged to cross a track in the station yard to get to a switch, and he walked along the ends of the ties, which projected some sixteen inches beyond the rails. While doing so an engine came behind him and knocked him down with his arm under the wheels and it was cut off near the shoulder. On the trial of an action against the company in consequence of such injury the jury found that there was negligence in the management of the engine in not ringing the bell and in going faster than the law allowed. They also found that J. could not have avoided the accident by the exercise of reasonable care.

Held, affirming the judgment of the Court below, GWYNNE and PATTERSON, JJ., dissenting, that there was no such negligence on J.'s part as would relieve the company from liability for injury caused by improper conduct of their servants.

Held, per TASCHEREAU and PATTERSON, JJ., that the Workmen's Compensation for Injuries Act of Ontario, 49 V. c. 28, applies to the defendants, notwithstanding they have been brought under the operation of the general Railway Act of the Dominion.

H. Symons, for the appellants.

S. H. Blake, Q.C., for the respondent.

RYAN v. CLARKSON.

Lien—Costs of execution creditor—Assignment for general benefit of creditors—Construction of statute 48 V. c. 26, s. 9—49 V. c. 25, s. 2—R. S. O. c. 44, s. 2—Ultra vires.

48 V. c. 26, s. 9 (O), as amended by 49 V. c. 25, s. 2, provides that an assignment for the general benefit of creditors has precedence over all executions not completely executed by payment "subject to the lien, if any, of an execution creditor for his

costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands."

Held, per RITCHIE, C.J., FOURNIER and TASCHEREAU, JJ., affirming the judgment of the Court of Appeal, 16 A. R. 311, that the lien referred to in this section attaches to the full costs of the action of the execution creditor against the insolvent debtor.

Held, per GWYNNE and PATTERSON, JJ., dissenting, that such lien is only for the costs of issuing execution and sheriff's fees, etc., incurred in executing the same.

The statute of Ontario requiring special leave to appeal to the Supreme Court in cases where the amount in controversy is under $1,000, R. S. O. c. 44, s. 2, is *ultra vires* of the legislature of Ontario and not binding on the Supreme Court.

The Court of Appeal cannot impose upon a suitor conditions upon which he shall be allowed to appeal to this Court.

Foy, Q.C., for the appellant.

Aylesworth, for the respondent.

In re UNION FIRE INSURANCE COMPANY.

SHOOLBRED'S CASE.

Winding-up Act—R. S. C. c. 129—Application of, to Provincial company—Winding-up proceedings—Reference to Master.

The Union Fire Insurance Company was incorporated by the Ontario Legislature, and having become insolvent, an assignee was appointed to settle its affairs under the Insolvent Act of 1875. When the Winding-up Act was passed a petition was presented to the Court to have the company wound up under its provisions and a winding-up order was made which was set aside by the Supreme Court of Canada, 14 S. C. R. 642. A second winding-up order having been made and confirmed by the Court of Appeal, a second appeal was had to the Supreme Court by S., a shareholder.

Held, affirming the judgment of the Court of Appeal, 16 A. R. 161, and that of BOYD, C., 14 O. R. 618, that notwithstanding the company was incorporated by the Provincial Legislature it could be put into compulsory liquidation and wound up under the Dominion Winding-up Act, R. S. C. c. 129.

Held, also, that the powers assigned to Provincial Courts or Judges by the Winding-up Act are to be exercised by means of the ordinary machinery of the Courts and their ordinary procedure. It was therefore no ground of objection to the winding-up order in this case that it was referred to a Master to settle the security to be given by the liquidator appointed therein.

S. H. Blake, Q.C., and *D. L. McLean*, for the appellant.

Bain, Q.C., for the respondents.

QUEBEC.]

VENNER v. SUN LIFE INSURANCE COMPANY.

Life insurance—Unconditional policy—Misrepresentations—Effect of—Indication of payment—Return of premium—Additional parties to suit—R. S. C. c. 124, ss. 27, 28—Arts. 2487, 2488, 2585, C. C.

An unconditional policy of life insurance was issued in favour of a third party, creditor of the assured, "upon the representations, agreements and stipulations" contained in the application for the policy signed by the assured, one of which was that "if any misrepresentation was made by the applicant or untrue answers given by him to the medical examiner of the company, then in such a case the premiums paid would become forfeited and the policy be null and void." Upon the death of the assured the person to whom the policy was made payable sued the company and at the trial it was proved that the answers given by the applicant as to his health were untrue, the insurer's own medical attendant stating that assured's was a life not insurable.

Held, that the policy was thereby made void *ab initio*, and the insurer could invoke such nullity against the person in whose favour the policy was made payable, and was not obliged to return any part of the premium paid.

2nd. That the statements misrepresented being referred to in express terms in the body of the policy, the provisions of ss. 27 and 28, R. S. C. c. 124, could not be relied on to validate the policy, assuming such enactments to be *intra vires* of the Parliament of Canada, which point it was not necessary to decide.

3rd. That the indication by the assured of the person to whom the policy should be paid in case of death and the consent by the company to pay such person did not effect novation, (Art. 1174, C. C.), and the provisions contained in Art. 1180, C. C., are not applicable in such a case.

It is too late to raise an objection for the first time on the argument before the Supreme Court, that the legal representatives of the assured were not made parties to the contestation between the parties in the cause.

Geoffrion, Q.C., and *Amyot*, Q.C., for the appellant.

Langelier, Q.C., for the respondent.

JONES v. FISHER.

Damage to land by construction of dam —Servitude—Arts. 503, 549, C. C.—C. S. L. C. c. 51—Improvement of water courses.

Where a proprietor has for the purpose of improving the value of a water power built a dam over a water course running through his property and has not constructed any mill or manufactory in connection with the dam, he cannot in an action for damages brought by a riparian proprietor whose land has been overflowed by reason of the construction of the dam, justify under the provisions of C. S. L. C. c. 51.

Where the proprietor of a water course raises the level of the water by the construction of a dam so as to overflow the land of other riparian owners, he cannot acquire by possession or prescription a right or title to the maintenance of the dam in question. Arts. 503, 549, C. C.

Laflamme, Q.C., for the appellant.

Geoffrion, Q.C., and *Duffy*, for the respondent.

NORTH SHORE RAILWAY COMPANY v. McWILLIE.

Railway — Damages caused by sparks from locomotive—Responsibility of company—R. S. C. c. 109, s. 27 — 51 V. c. 29, s. 287—Limitation of action for damages.

A railway company by running a heavy train on an up grade when there was a strong wind caused an unusual quantity of sparks to escape from the locomotive which set fire to a barn situated in close proximity to the railway track.

Held, affirming the judgment of the Courts below, that there was sufficient evidence of negligence to make the railway company liable for the damage caused by the fire.

Per GWYNNE, J., that the "damage" referred to in s. 27 of c. 109, R. S. C., and s. 287 of 51 V. c. 29, is "damage" done by

the railway itself, and not by reason of the default or neglect of the company running the railway or of a company having running powers over it, and therefore the prescription of six months referred to in said sections is not available in an action like the present.

Brosseau, for the appellant.

Robinson, Q.C., and *Geoffrion*, Q.C., for the respondent.

NOVA SCOTIA.] [12TH JUNE, 1890.

SPINNEY v. OCEAN MUTUAL INSURANCE COMPANY.

Marine insurance—Delay in prosecuting voyage—Deviation—Increase of risk.

The cargo of a coasting vessel was insured for a voyage from Pubnico, N. S., to Lunenberg or Halifax, the policy containing the usual clause allowing the vessel, in case of extremity, to put into and stay at any port or ports without prejudice to the insurance. The vessel sailed on 15th December, 1886, and on 21st December arrived off Shelbourne harbour and put in there for shelter. The next day she started again, but returned to the harbour, remaining until 27th December, when she went out and again returned. She did not attempt to sail again until 3rd January at midnight, and was driven back by a storm, and on 4th January she got out of the harbour and there being a heavy sea attempted to get back but got on shore and was wrecked. In an action to recover the insurance, evidence was given by the shipmasters and from the log of a Government vessel cruising in the vicinity that the vessel could have proceeded on her voyage several times during the stay in Shelbourne, and it was shown that other vessels had put into Shelbourne during the same time and had gone to sea again. The insurance company pleaded, among other pleas, barratry and deviation. The trial Judge held that the conduct of the master of the insured vessel, there being no satisfactory explanation or excuse offered for his delay, amounted to barratry, and gave judgment for the defendants on that plea. The full Court on appeal held that barratry was not established, as it depended on the evidence of a witness to whom the trial Judge attached no credit, but they sustained the verdict on the ground of deviation. On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the Court below, 21 N. S. Reps. 244, that there is an implied condition in a contract of

marine insurance, not only that the voyage shall be accomplished in the ordinary track or course of navigation, but that it shall be commenced and completed with all reasonable and ordinary diligence, and any unreasonable or unexcused delay, either in commencing or prosecuting the voyage, alters the risk and absolves the underwriter from liability for subsequent loss.

Held, also, that in case of deviation by delay, as in that of departure from the usual course of navigation, it is not necessary to show that the peril has been enhanced in order to avoid the policy.

Henry, Q.C., and *Bingay*, for the appellants.

Borden, for the respondents.

FITZRANDOLPH v. MUTUAL RELIEF SOCIETY OF NOVA SCOTIA.

Life insurance—Application for policy—Reference to application in policy—Construction—Warranty—Misstatement.

An application for membership in a mutual insurance society contained a declaration by the applicant warranting the truth of the answers to the questions, and of the statements in such application, and an agreement that if any of the same were not true, full, and complete, the bond of membership issued thereon should be void. Among the questions in the application was one requiring the applicant to answer "yes" or "no" as to whether he had ever had any of certain diseases named. The list of such diseases was printed in perpendicular columns, and opposite the disease at the head of each column the applicant wrote "no," and underneath it opposite the other diseases named placed marks like inverted commas. On the trial of an action to recover the amount insured by a bond issued in pursuance of this application it was found as a fact that the applicant had had one of the diseases opposite which the said marks appeared. The bond issued purported to insure the applicant "in consideration of statements made in the application herefor," etc.

Held, affirming the judgment of the Supreme Court of Nova Scotia, 21 N. S. Reps. 274, that the application was incorporated with the bond and made part of the contract for insurance, and that, whether the applicant intended the mark opposite the dis-

ease which it was found he had had to mean "no" or intended it as an evasion of the question, the bond was void for breach of the warranty in the application.

Borden, for the appellant.

Henry, Q.C., for the respondent.

[13TH JUNE, 1890.

DUGGAN v. DUGGAN.

Will—Legacy under—Contingent interest—Protection against waste.

The will of J. D. contained a bequest to any child or children of a deceased brother of the testator who should be living at the death of the testator's wife. P. D. was the only son of such deceased brother, and during the lifetime of the widow he brought suit to have his legacy protected against dissipation of the estate.

Held, reversing the judgment of the Court below, that P. D. had more than a possibility or expectation of a future interest; that he had an existing contingent interest in the estate; and was entitled to have the property preserved so that his legacy could be paid in the event of the interest becoming vested.

L. Newcombe, for the appellant.

Borden, for the respondent.

POWER v. MEAGHER.

Trustees—Commission to—Rule of law.

Prior to the passing of the Nova Scotia statute 51 V. c. 11, s. 69, there was no statutory authority for trustees to receive commission for their services when none was provided for by the instrument creating the trust. In a case which did not come within the statute,

Held, reversing the judgment of the Supreme Court of Nova Scotia, 21 N. S. Reps. 184, that the English rule of law prohibiting such commission was applicable to and in force in that Province.

L. G. Power, appellant, in person.

Henry, Q.C., for the respondent.

BRITISH COLUMBIA.]

TURNER v. PREVOST.

Statute of Frauds—Contract relating to interest in land—Part performance.

B., a resident of British Columbia, wrote to his sister in England that he would like one of her children to come out to him, and in a second letter he said, "I want to get some relation here; for what property I have, in case of sudden death would be eat up by outsiders and my relations would get nothing." On hearing the contents of these letters T., a son of B.'s sister, and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine in Idaho. While there he received a letter from B. containing the following:—"I want you to come at once, as I am very bad. I really do not know if I shall get over it or not and you had better hurry up and come to me at once, for I want you and I dare say you know the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter T. immediately started for the farm, but B. had died and was buried before he reached it. After his return he received the following telegram which had not reached him before he left for home, "Come at once if you wish to see me alive, property is yours, answer immediately. (Signed) B." Under these circumstances T. claimed the farm and stock of B, and brought this action for specific performance of an alleged agreement by P. that the same should belong to him at B.'s death.

Held, affirming the judgment of the Court below, that there was no agreement in writing for the transfer of the property to T., and the facts shown were not sufficient to constitute a part performance of such agreement, and the fourth section of the Statute of Frauds was not complied with and no performance of the contract could be decreed.

S. H. Blake, Q.C., for the appellant.

Moss, Q.C., for the respondent Power.

McCarthy, Q.C., and *A. F. McIntyre*, for the other respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [26TH MAY, 1890.

MENDELSSOHN PIANO COMPANY v. GRAHAM.

Partnership—Loan—Debtor and creditor—Sharing profits.

This was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, 19 O. R. 88, and came on to be heard before this Court on the 23rd of May, 1890.

R. S. Neville, for the appellants.

E. Coatsworth, for the respondent West.

The Court dismissed the appeal with costs, agreeing with the conclusions arrived at in the Court below.

C. P. D.] [13TH MAY, 1890.

LIVINGSTONE v. TEMPERANCE COLONIZATION SOCIETY.

Company—Shareholder—Calls—Surrender of shares—Cancellation of shares—Compromise—Invalid resolution.

A trading corporation has authority as an incident of its existence to compromise all *bona fide* claims made against it; and therefore has power to compromise claims made by a shareholder to be relieved of his shares, either by reason of fraud or misrepresentation or any other cause which would enable the Court to decree such relief, but as the Court, if a shareholder were to make a claim against the corporation for compensation in damages in respect of some matter not connected in any way with the validity of the shares held by him, could not decree a cancellation *pro tanto* of those shares, so the corporation itself cannot validly compromise a claim for damages against it by accepting the surrender of, and by cancelling, shares of its capital stock held by the claimant.

Judgment of the Common Pleas Division reversed.

Moss, Q.C., and *W. Barwick*, for the appellants.

The respondent Livingstone in person.

MacMahon, J.]

SHAIRP v. LAKEFIELD LUMBER CO.

Free grants—Crown timber—Timber license—Trespass—Patent—Reservation—R. S. O. c. 25, ss. 4, 10—R. S. O. c. 28.

The plaintiff was in March, 1884, located as the purchaser of a lot in the township of Burleigh and obtained a patent therefor in November, 1888, the patent being in the usual form of a patent in fee to a purchaser, without any reservation of timber or any reference to the Free Grants and Homesteads Act. The defendants, assuming to act under a timber license issued in May, 1888, covering this and other lots, entered upon the lot after the issue of the patent and took timber therefrom. In the license the lot was referred to as "located and sold." The township of Burleigh was within the geographical limits described in s. 4 of the Free Grants and Homesteads Act, R. S. O. c. 25, but had never been appropriated or set apart as free grant lands under the provisions of that Act.

Held, that the lot was not "land located or sold within the limits of the Free Grant Territory," within the meaning of that Act, and that the patent was not subject to the reservations as to timber in that Act contained.

The expression "Free Grant Territory" in s. 10 does not refer to the whole territory or tract defined in s. 4, but only to that portion of that territory or tract which may be actually set apart and appropriated by the Lieutenant-Governor in Council under the Act.

Held, further, that there being no actual reservation in the patent, the defendants had no right to cut the timber after the issue of the patent, and were liable in damages.

Judgment of MacMahon, J., affirmed.

Poussette, Q.C., and *Aylesworth*, for the appellants.

Watson, Q.C., and *E. B. Edwards*, for the respondent.

C. E. Elgin.]

PECKHAM v. DEPOTTY.

Contract—Master and servant—Parent and child.

The plaintiff, while a child of very tender years, had been placed by her father with the defendant, who was not a relation,

to remain with him until she attained eighteen years of age, he agreeing to support her during that time, to send her to school, to supply her with clothing, and to give to her certain articles when she reached the age of eighteen. She remained with the defendant until she was nearly twenty years of age, being in all respects treated as a member of the family, and doing such work as a member of the family naturally would do.

Held, that the plaintiff had no implied right to remuneration for services rendered after she attained the age of eighteen, and that in the absence of any express agreement for payment of wages she could not recover.

Judgment of the Court below reversed.

Aylesworth, for the appellant.

J. S. Robertson, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 6th June, 1890.

McCRANEY v. McCOOL.

Partnership—Dissolution—Pending contract.

The defendants contracted to deliver lumber to a firm of three partners. Before delivery the firm was dissolved, and the defendants refused to carry out their contract

In an action brought in the individual names of the three partners for damages for non-delivery :—

Held, that the dissolution of the firm was no justification in law for the defendants' refusal to carry out their contract.

Fullerton, Q.C., for the plaintiffs.

M. J. Gorman, for the defendants.

[27th June, 1890.

In re SMITH AND THE CITY OF TORONTO.

Costs—Arbitration—Powers of arbitrators—35 V. c. 79—R. S. O. c. 184, ss. 483, 399—Duty of taxing officer.

By 35 V. c. 79 the water-works commissioners of the city of Toronto were authorized to expropriate lands for the purpose of

water-works, and in case of disagreement to have the value ascertained by arbitration; and by 41 V. c. 41 all the powers of the commissioners were vested in the city corporation.

The city corporation, desiring to expropriate certain land for water-works purposes, passed a by-law reciting the above enactments and authorizing the expropriation, and afterwards served a notice offering to pay the land-owner $25,000, and in the event of his not accepting, requiring him "pursuant to s. 398 of the Municipal Act," to appoint an arbitrator. The arbitrators appointed took the oath prescribed by the Municipal Act, which was different in substance from that prescribed by 35 V. c. 79.

Held, that s. 483 of the Municipal Act, R. S. O. c. 184, had the effect of superseding the procedure for arbitration provided by 35 V. c. 79, and of substituting therefor the procedure for arbitration provided by the Municipal Act; and that the city corporation, having adopted and taken advantage of the procedure provided by the Municipal Act, could not escape the consequences; and therefore the arbitrators had power under s. 399 of the Municipal Act to award costs to the land-owner, there being no power to do so under 35 V. c. 79.

Semble, also, that the arbitrators having awarded costs, and their award not having been moved against, it was the duty of the taxing officer to tax the costs.

H. S. Osler, for the land-owner.

Biggar, Q.C., for the City of Toronto.

[BOYD, C., 4TH JUNE, 1890.

CANN v. KNOTT.

Free grants and homesteads—Exemption from execution—Interest of original locatee as mortgagee after alienation.

The defendant was locatee of certain lands under the Free Grants and Homesteads Act, R. S. O. c. 25, and duly obtained patents therefor. Afterwards he and his wife sold and conveyed parts of the land, taking back mortgages to secure the purchase money.

Held, that the mortgages were not interests in the land exempt from levy under execution within the meaning of s. 20, s-s. 2.

The exemption extends to the land or any part thereof or interest therein so long as it is held by the original location title, whether before or after patent; but where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him quâ locatee.

Moreover, the word "interest" used in the sub-section does not extend to the interest of a mortgagee.

D. Urquhart, for the plaintiff.

Foy, Q.C., for the defendants.

CUMMING v. LANDED BANKING AND LOAN COMPANY.

Trusts and trustees—Breaches of trust—Taking securities in name of one of two joint trustees—Pledging securities for advance—Misapplication of moneys advanced—Following securities in hands of pledgee.

W., one of two joint trustees, assumed to lend trust moneys on the security of mortgages on land, taking the mortgages to himself alone as trustee of the estate and effects of J. C., deceased. These mortgages were hypothecated by W. to the defendants, and moneys were advanced to him by the defendants, ostensibly to meet an unexpected call by one of the beneficiaries; but the moneys were not so applied, nor otherwise for the benefit of the estate, and they were not required for any such purposes under the terms of the will creating the trust.

In an action by the other trustee and two new trustees, who were also beneficiaries, appointed in the stead of W.,

Held, that W. had been guilty of two breaches of trust, and that the plaintiffs were entitled to follow the trust securities and to make the defendants account for all moneys received by them thereunder.

Marsh, Q.C., for the plaintiffs.

S. H. Blake, Q.C., and *MacKelcan*, Q.C., for the defendants.

WESTERN ASSURANCE COMPANY v. ONTARIO COAL COMPANY.

Maritime law—General average contribution—Attempt to rescue vessel and cargo—Common danger—Average bond—Adjustment—Expenditure—Liability of owners of cargo.

A vessel loaded with coal stranded under stress of weather, and was abandoned as a total loss to the underwriters, the plain-

tiffs. The owners of the cargo, the defendants, proposed to unload at their own expense, but the plaintiffs refused to allow this and told the defendants that they could not get the cargo without signing an average bond. Upon this the defendants signed a bond which was *ex facie* imperfect, and the plaintiffs took steps to save vessel and cargo by one expedition. They failed to rescue the vessel, but saved the larger part of the cargo. They now claimed upon adjustment contribution from the defendants for the expenditure incurred, which was in excess of the value of the salvage.

Held, that the vessel and her cargo were not when stranded in a common danger, and the expenditure was not for the preservation and safety of both ship and cargo, but for the deliverance of the vessel alone; that the average bond signed did not bind the defendants to pay more than they were rightfully liable to pay, and the adjustment was no obstacle to the determination of the real liability; and that the defendants were liable only to pay what they would have paid to recover the cargo by their own exertions.

Osler, Q.C., for the plaintiffs.

Delamere, Q.C., and *T. Urquhart*, for the defendants.

[FALCONBRIDGE, J., 26TH APRIL, 1890.

BRENNEN v. BRENNEN.

Husband and wife—Action by wife against husband's relatives—False representations and conspiracy to bring about marriage—Want of precedent—Public policy.

Action by a married woman against the father, mother, and brother of her husband for damages for false representations made to her before marriage as to the character and financial standing of her husband, and for entering into a fraudulent conspiracy to induce the plaintiff to enter into the marriage contract.

Held, that the action was not maintainable because without precedent and contrary to public policy.

J. K. Kerr, Q.C., and *Neville*, for the plaintiff.

McCarthy, Q.C., and *Bicknell*, for the defendant Michael Brennen.

S. H. Blake, Q.C., for the defendant Sarah Brennen.

J. A. McCarthy, for the defendant Hugh Brennen.

[STREET, J., 21ST MAY, 1890.

COUNTY OF MIDDLESEX v. SMALLMAN.

Registrar of deeds—Bond for performance of duties of office—Payment to municipality of portion of fees—Liability of sureties—R. S. O. c. 114, ss. 13, 107.

The action was upon a bond executed by the defendants as sureties for a Registrar of deeds, dated 8th January, 1886, to recover the portion of fees received by the Registrar which he should have paid over to the plaintiffs under R. S. O. c. 114, s. 107.

The bond was in the form prescribed by Schedule A. of the Act, and was conditioned for the performance of the duties of the Registrar's office and against negligent or wilful misconduct in office to the damage of any person or persons.

This form was prescribed before the introduction of the provisions now contained in s. 107, and s. 13 makes special provision for the giving of special security for the payment of the moneys under s. 107.

Held, that the bond given by the defendants must be taken to be restricted to the performance by the Registrar of the duties imposed upon him other than the duty imposed by s. 107; and the action was dismissed.

Purdom, for the plaintiff.

Osler, Q.C., and *Flock*, Q.C., for the defendants.

[MACMAHON, J., 17TH MAY, 1890.

REGINA v. CREIGHTON.

Criminal law—Pleading—Libel—Justification—Particulars—Motion to quash plea—R. S. C. c. 174, s. 2, s-s. (c.); s. 143.

To an indictment for libel the defendant pleaded that the words and statements complained of in the indictment were true in substance and in fact, and that it was for the public benefit that the matters charged in the alleged libel should be published by him.

Held, that the plea was insufficient because it did not set out the particular facts upon which the defendant intended to rely; and that the omission from 37 V. c. 38, s. 5, (R. S. C. c. 163, s. 4) of the words "in the manner required in pleading a

justification in an action for defamation," which were contained in C. S. U. C. c. 108, s. 9, had not the effect of altering the rule.

Held, also, that this was a case in which the Court should in the exercise of its discretion quash the plea upon a summary motion, without requiring a demurrer, a course permitted by s. 148 of R. S. C. c. 174, as interpreted by s. 2, s-s. (c).

S. H. Blake, Q.C., *Osler*, Q.C., and *Marsh*, Q.C., for the prosecutors.

Ritchie, Q.C., *Laidlaw*, Q.C., and *H. Cassels*, for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 16TH JUNE, 1890.

LEACH v. GRAND TRUNK R. W. CO.

Discovery—Examination of officer of railway company—Driver of "light engine"—New evidence on appeal—Rule 585—Leave to appeal—Delay.

A rule of the defendant company provided that the driver in charge of a "light engine" has all the responsibilities of a conductor in cases where a train of cars is attached to the engine.

Held, that the driver of a light engine which knocked down and killed the man for whose death the action was brought was an officer of the company who could be examined for discovery under Rule 487.

Knight v. Grand Trunk R. W. Co., 18 P. R. 386, distinguished.

New evidence was allowed to be used upon appeal under Rule 585, and the decision of FERGUSON, J., 18 P. R. 388, was reversed thereupon. The discovery of the new evidence after a sittings of the Divisional Court had passed, was received as an excuse for delay.

J. W. McCullough, for the plaintiff.

Douglas Armour, for the defendants.

[9TH JUNE, 1890.

PHELPS v. ST. CATHARINES AND NIAGARA CENTRAL RAILWAY COMPANY.

Railways and railway companies—Bondholders' rights in respect to property of railway companies—Judgment creditors' right to attach the company's money on deposit in a bank—Appointment of receiver—Remedy.

Held, reversing the decision of BOYD, C., 18 O. R. 581, that so long as a railway company is a going concern bondholders have

no right, even though interest on their bonds be overdue and unpaid, to seize or take or sell or foreclose any part of the property of the company by virtue of their mortgage bonds, and that their remedy is the appointment of a receiver, and that the bondholders in this case were not entitled to the money in question.

H. H. Collier, for the judgment creditors.

Hoyles, Q.C., and *Ingersoll*, for the bondholders.

WHITE v. TOMALINE.

Sale of goods—Agreement in writing—Offer—Statute of Frauds—Evidence.

In an action for specific performance of an alleged agreement worded as follows, "I hereby agree to sell my stock of * * * and agree to take in payment for said stock * * * one hundred acres of land being," * * * (terms set out) and signed, J. T. (defendant), and F. B. McM. (assignor to plaintiff):—

Held, affirming the decision of FALCONBRIDGE, J., that the document was not an agreement in writing sufficient to satisfy the Statute of Frauds, but a mere offer or proposal to sell.

It was shown that an acceptance worded "I hereby agree to purchase the above mentioned stock in the terms aforesaid and to convey the land intended to be taken in exchange" was subsequently added and signed by F. B. McM.

Held, that the offer, originally vague and indefinite, could not be made certain in that way; for any other person as well as McM. could have with as much reason appended a similar acceptance.

Held, also, that from the frame of the offer one could not know to whom it was made without parol evidence to supplement the writing, which could not be given to supply information in that regard.

Aytoun-Finlay and *Schoff*, for the plaintiff.

Bain, Q.C., and *Beynon*, Q.C., for the defendant.

[THE JUSTICES IN BANC, 26TH JUNE, 1890.

REGINA v. PREST.

Courts—Chancery Division—Crown case reserved—Time.

R. S. C. c. 174, s. 2, s-s. (h), provides that "The expression 'the Court for Crown cases reserved' means and includes;—(1)

In the Province of Ontario, any Division of the High Court of Justice for Ontario."

Held, that a Court constituted of the three Judges at present attached to the Chancery Division, sitting *in banc*, was a Court for Crown cases reserved within the meaning of the statute; that it is unnecessary to have a sittings of a Division of the High Court to hear a Crown case reserved; but that the Judges can come together at any time for such purpose, and are not limited to terms or fixed sittings.

J. R. Cartwright, Q.C., for the Crown.

Justin, for the prisoner.

[BOYD, C., 6TH JUNE, 1890.

MACKLEM v. MACKLEM.

Will—Devise—Forfeiture—Actual possession and occupation—Possession by servant, caretaker, or worker on shares.

S. M. had become entitled under T. C. S.'s will to a certain property called "Clarke Hill," of which T. C. S. was owner when he died, and also to an undivided interest in certain other property of which T. C. S. was tenant in common with others. He also became entitled to a legacy under the following clause of A. H. S.'s will:—"I will and direct that so soon as S. M. * * can and does take actual possession of the real estate and property * * under the will of T. C. S. * * my executors * shall * * so long as he remains the owner and actual occupant of said real estate pay over to him * * * the annual sum of $2,000 to enable," etc.

Held, that this clause, read in connection with the will of T. C. S., referred only to the land of which T. C. S. was absolute owner, and not to the land he owned as tenant in common.

Held, also, that actual possession and occupation as to the land is consonant with and satisfied by the possession of a servant or caretaker, or even a worker on shares.

F. E. Hodgins, for the plaintiff.

Robinson, Q.C., for the defendant S. Macklem.

Moss, Q.C., and *R. R. Bruce*, for the defendants Bruce and others.

Bicknell, for the defendant D. C. Plumb.

O. R. Macklem, for the defendants Becher and others.

[FERGUSON, J., 31ST MAY, 1890.

WALLBRIDGE v. GAUJOT.

Costs—Third party—Defending action.

In an action for rent or royalties upon iron mined by the defendants, the defendants served a notice upon a third party claiming contribution from him. The third party appeared; and an order was made that he should be at liberty to defend the action as regarded the questions between the plaintiff and the defendants only, and to appear at the trial, call witnesses, cross-examine the witnesses called by the plaintiff and defendants, and be bound by the findings. The third party delivered a statement of defence, which was directly against the plaintiff's statement of claim, except a portion thereof which stated that he was not a proper party and that no right of contribution existed against him, but this portion was struck out at the trial upon his own application. The plaintiff was successful in the action.

Held, that the third party had adopted the position of one who was called upon by his own interest to defend the action, and that he should not recover from the defendants who brought him in his costs of so defending it.

W. Cassels, Q.C., for the defendant Palmer.

W. M. Douglas, for the third party.

[ROBERTSON, J., 13TH MAY, 1890.

In re SAUGEEN MUTUAL FIRE INSURANCE CO. KNECHTEL'S CASE.

Mutual insurance company—53 V. c. 44, s. 4 (O.)—Retrospective operation.

Appeal from the Master at Guelph.

Held, that 53 V. c. 44, s. 4 (O), substituting a new section for R. S. O. c. 167, s. 132, is retrospective in its operation, and applies to premium notes given before its passing, as well as to those given afterwards.

Kingston, Q.C., for the appellants.

Hoyles, Q.C., for the respondent.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 7TH JUNE, 1890.

COUNTY OF ESSEX v. WRIGHT.

Consolidation of actions—Staying actions—Principal and sureties—Reference—Costs.

Twelve actions brought by a municipality against the different sureties of the municipal treasurer, to recover amounts alleged to have been received by the treasurer and not accounted for, were consolidated, and proceedings in them were stayed pending the determination of an action against the treasurer himself to recover the same amounts.

In the action against the treasurer a reference was directed to ascertain what was due from him, and an order was made permitting the sureties to appear upon the reference and contest the claims of the municipality. This order was varied by making provision for awarding costs as between the municipality and the sureties.

G. T. Blackstock, for the plaintiffs.

S. H. Blake, Q.C., for the defendant Wright.

Langton and *W. H. Blake*, for the other defendants.

IN CHAMBERS.

[BOYD, C., 30TH JUNE, 1890.

In re MALLANDINE.

Devolution of Estates Act—Sale of land by administrators—Consent of adults interested.

E. T. Malone, for the Toronto General Trusts Company, administrators of the real estate of John Mallandine, deceased, applied for a direction as to whether the applicants should sell the real estate, the persons beneficially interested being one adult and several infants. The adult objected to a sale.

There was no necessity for a sale to pay debts.

J. Hoskin, Q.C., for the infants.

BOYD, C., held that, under the circumstances, the estate could not be sold by the administrators. The sale could only be had under proceedings for partition or sale.

[FERGUSON, J., 4TH JULY, 1890.

MILLER v. SPENCER.

Long vacation—Settling minutes of judgment.

A direction to the registrar to settle in long vacation the minutes of a judgment pronounced on the 30th June was refused.

W. H. Blake, for the plaintiff.

[STREET, J., 6TH JUNE, 1890.

SIMS v. SLATER.

Particulars of claim—Facts within knowledge of defendants—Examination for discovery.

An appeal by the defendant Esther Slater from an order of the Master in Chambers refusing to strike out a certain paragraph of the statement of claim, or to direct particulars thereof.

The paragraph in question sets up that the defendants conspired to induce the Minister of Railways to take a contract out of the hands of the plaintiff to his prejudice and damage.

Shepley, Q.C., for the appellant.

Douglas Armour, for the plaintiff.

STREET, J., held that in a case of this kind, where the circumstances lie in the knowledge of the defendants rather than the plaintiff, the plaintiff should not be called upon for particulars before examining the defendants for discovery.

Appeal dismissed, without prejudice to a fresh application for particulars after discovery. Costs to the plaintiff in any event.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

McLATCHIE v. McLEOD.

Execution—Exemption from seizure under—Land once bound by writ not afterwards exempted.

The defendant sold land to his father in 1882. The plaintiff recovered judgment against the defendant in 1885, for $15,000, and issued fi. fa. lands. In 1888 a decree declared the deed from the defendant to his father fraudulent as against the plaintiff. Immediately after decree the father reconveyed the land to the defendant to enable him to claim it as exempt from seizure. Until the reconveyance the defendant lived with his father upon the land as a member of his family only, and the cultivation was by, or for the benefit of, the father. After the reconveyance the father lived with the defendant, who resided upon and cultivated the land.

Held, that the land was not exempt from sale under the fi. fa. The land, having once been bound by the writ, did not become exempt by the acts of the defendant.

REGINA v. JEWELL.

Criminal law—Having in possession goods stolen abroad—Foreign law.

Upon a charge of having in possession goods stolen in a foreign country it is not always necessary to prove the state of the law of that country.

Per TAYLOR, C. J.—When the Crown proved that the prisoner had taken and had in his possession in Canada property which he had, in any other country, taken under such circumstances that had he taken it in like manner in Canada, it would, by the laws of Canada, have been felony, then the offence for which he was indicted was proven.

2. And an allegation in the indictment that the prisoner "feloniously had taken and carried away" the goods, does not impose any additional burden of proof upon the Crown.

Per KILLAM, J.—It may be necessary, under certain circumstances, for the Crown to prove the foreign law, as an element in the moral quality of the act.

STEPHENS v. McARTHUR.

Statutes—Construction—Ultra vires—Fraudulent conveyances—Locus standi of creditor—Chattel mortgage—Debt secured by transferred notes.

A local statute provided that certain conveyances should be fraudulent against creditors; for voluntary assignments for the benefit of creditors; and that the assignee should have the exclusive right to sue for the rescission of such conveyances.

Held, 1. That the statute was *ultra vires* of the legislature.

2. That the conveyances might be attacked by creditors where no assignment had been made by the debtor.

A creditor in good faith and without knowledge that the debtor was insolvent, took from him a chattel mortgage. The transaction was straightforward and honest, but the "effect" of it was to give to the mortgagee a preference over other creditors.

Held, that the mortgage was void as against creditors.

A chattel mortgage was expressed to be to secure payment of $870.34, which was the amount owing by the mortgagor to the mortgagee. A large portion of it, however, was represented by notes, which the mortgagee had previous to the date of the mortgage transferred to a bank as collateral security for his own debt.

Held, that the mortgage was valid.

Fish v. *Higgins*, 2 Man. L. R. 65, followed.

Per KILLAM, J.—The section of the Act declaring certain conveyances fraudulent against creditors may be treated apart from the other provisions of the statute, as an independent enactment; and not, therefore, *ultra vires* by reason only of its association with other statutory provisions.

TODD v. UNION BANK OF CANADA.

Costs—Retrospective statute—County Courts.

In an action on contract the plaintiff had a verdict for $101. When the action was commenced the County Court had juris-

diction up to $250, but when the amount claimable exceeded $100 the action could be brought in the Queen's Bench. In such case if the verdict exceeded $200 full costs were given, but if less than $200 and more than $100 costs upon a lower scale were taxed.

Pending the action an Act provided that "in case an action of the proper competence of the County Courts be brought in the Queen's Bench," County Court costs only should be allowed, and that subject to a set-off of Queen's Bench costs, unless the presiding Judge certified to entitle otherwise.

Held, that the statute, although passed after the case was commenced, governed the question of costs.

MILLER v. MANITOBA LUMBER & FUEL CO.

Malicious prosecution—Authority of manager of company to direct prosecution—Want of bona fides—Damages.

The manager of a company (resident at its head office) directed the prosecution of the plaintiff for larceny of the company's property. The general solicitor of the company advised the arrest, prepared the information, and conducted the prosecution. The duties of the manager were prescribed by by-law. They did not enable him to take such proceedings. There was no evidence of express authority from the company, or that the arrest was within the scope of his duties.

Held, DUBUC, J., *dissenting*, that the company was not liable for the arrest.

The objection that the company had not authorized the arrest was taken on motion for non-suit at the close of the plaintiff's case, but not as an objection to the Judge's charge.

Held, that the point was open in term.

Per DUBUC, J.—Evidence that a prosecution was instituted to save the trouble and expense of a lawsuit in a Court of civil jurisdiction, tends to show an "indirect motive" and lack of good faith.

2. Where a verdict cannot be impeached except upon the ground of excessive damages, the Court may, with the plaintiff's consent, reduce the damages.

HOWE v. MARTIN.

Interpleader—Security for costs—Extension of time—Withdrawal of sheriff —Appeal.

An interpleader order directed that the plaintiffs should give security for costs to the satisfaction of the Prothonotary on or before the 10th April, and that in default they should be barred from all claim to the goods.

On the day named the plaintiffs paid $200 into Court, but did not obtain, upon notice to the claimant, an expression of the Prothonotary's satisfaction with such security.

Held, that the Referee had (after the expiration of the day named) jurisdiction to extend the time.

2. The withdrawal from possession by the sheriff after the day named was no bar to an appeal by the plaintiffs from an order reversing the Referee's order extending the time.

REGINA v. STARKEY.

Certiorari—County Judge or magistrates—Amendment of notice—Affidavits —Arguing validity of conviction upon motion for certiorari—Appeal to County Judge.

S., having been convicted before magistrates, took proceedings to appeal to the County Judge, and procured the papers to be sent to his clerk. Afterwards, and before any proceeding by the Judge, he had the papers returned to the magistrates. Upon notice to the magistrates he now moved for a writ of *certiorari*.

Held, 1. That the return of the papers to the magistrates was irregular and that the certiorari should go to the County Judge.

2. That the notice for a certiorari to the magistrates could not be amended; and the application was dismissed.

It is not necessary that the affidavits by which objections are raised should be sworn and filed before service of the notice on the magistrates.

The notice must show who the party moving is.

The practice of arguing the validity of the conviction upon the application for the certiorari does not apply where the magistrates do not appear upon the notice. If they appear time may be given them to prepare for argument.

The pendency of an appeal to the County Judge does not interfere with certiorari; unless, at all events, the question of jurisdiction is not raised upon the appeal.

[DUBUC, J.

In re TAIT.

Constitutional law—Descent.

The law of primogeniture was never introduced into Manitoba.

CASE v. STEPHENS.

Law stamps—Papers annexed to affidavit.

Papers annexed to an affidavit are not filings distinct from the affidavit, and do not require to be stamped.

HOCKIN v. WHELLAMS.

Execution—Exemption from—Abandonment of homestead—Statutes—Repeal—Mortgage of homestead—Partnership—Assignment of judgment.

The Act 49 V. c. 17, s. 117, s-s. 8, exempts from execution the land upon which the defendant or his family resides, or which he cultivates wholly or in part, not exceeding 160 acres, provided that "said 160 acres must be outside the limits of any city or town." The proviso was by 49 V. c. 35, s. 2, repealed.

Held, that the repeal rendered lands within town limits exempt from execution for debts incurred previous to the repeal.

The defendant owned a homestead and occupied a house upon it for several years. He himself was much absent in England, but his family continued to reside there until the 1st of October, 1889, when, without the defendant's knowledge, they removed to another place, for the temporary purpose merely of wintering their cattle. In the following March they returned to the homestead accompanied by the defendant.

Held, that in the absence of evidence to show an intention to abandon the homestead, or that the plaintiff was in any way misled, the exemption still continued.

A conveyance of a homestead by way of mortgage does not preclude a claim of exemption from execution.

Quære.—Can one member of a partnership after dissolution assign a judgment obtained by the firm?

[KILLAM, J.

ROWAND v. THE RAILWAY COMMISSIONER.

Interlocutory injunction—Evidence—Affidavit—Employment of arbitrator by party.

Although for the purposes of an interlocutory injunction there is not required to be the clear evidence necessary to support the case at the hearing, yet there must be some evidence.

The Railway Commissioner being desirous of expropriating lands of the plaintiff, arbitrators were appointed, C. (one of them) being appointed by the other two. Contemporaneously with the progress of the arbitration, C. was engaged in auditing certain municipal books, at the request of the Municipal Commissioner. For this work he was paid by the Municipal Commissioner, who intended to reimburse himself out of the legislative grant to the municipality. The Railway Commissioner was a Minister of the Crown. The Municipal Commissioner was a corporation sole and also a Minister of the Crown. The moneys he disbursed were those of the municipalities and not those of the crown. The two arbitrators (one of them being C.) who made the award swore that they were not influenced by C.'s employment.

Held, that it did not appear that C. might have been biassed or affected in any degree by his employment; and that an interlocutory injunction restraining the taxation of costs under the award should not be granted.

An affidavit alleging "that the facts stated in the bill of complaint herein are true in substance and in fact and to the best of my knowledge and belief," is wholly insufficient to form the ground of an interlocutory injunction.

HAFFIELD v. NUGENT.

Property of convicted felon—Imp. Act, 33 & 34 V. c. 23—Pleading—Allegations of fraud—Multifariousness.

Irrespective of the Imp. Act, 33 & 34 V. c. 23, all chattel property, including choses in action, possessed by a felon at the

time of his conviction or acquired thereafter during the currency of his sentence, passes to the Crown.

Quære, whether the Imp. Act prohibiting a convict from suing, and vesting the right to sue in an administrator, is in force here.

Precision in pleading fraud discussed.

A bill by a client against solicitors for an account and to set aside a conveyance of land made by the client, at the instance of the solicitors, to the wife of one of them, is multifarious.

GRANT v. HUNTER.

Real Property Act—Issue—Security for costs.

A. applied for a certificate of title. B. filed a caveat. Both parties clnimed under conveyances from patentee.

Held, that in an issue to try the right A. should be plaintiff, and, being out of the jurisdiction, should give security for costs.

McCarthy v. *Badgley*, 6 Man. L.R. 270, considered.

JOHNSON v. LAND CORPORATION.

Amendment after judgment entered upon demurrer—Jurisdiction of Referee —Bill for an account—Equitable plea.

To a declaration for payment for services by the plaintiff as the servant of the defendant, the defendant pleaded various pleas. To one of these the plaintiff demurred; upon the others he joined issue. The defendant then obtained an order striking out all the pleas except the one demurred to. The plaintiff succeeded upon the demurrer. The defendant then applied in Chambers to add two pleas. The Referee refused the application and the plaintiff signed judgment. The defendant appealed from the Referee's order.

Held, 1. That the Referee had jurisdiction to permit the pleas to be added.

2. The discretion to amend should be used to the utmost extent consistent with justice and the rights and interests of the parties.

3. An equitable plea asking for an account permitted to be added, unless the plaintiff would undertake not to set up the judgment in defence to a bill in equity.

4. Circumstances under which a bill for an account will lie, discussed.

[BAIN, J.

FONSECA v. SCHULTZ.

Contribution—Payment of defendant's taxes.

Upon demurrer to a bill alleging that the plaintiff's and defendant's lands having been together sold for taxes, the plaintiff redeemed both, and praying contribution :—

Held, overruling the demurrer, 1. That as the land sold was not composed of more than one lot or parcel according to a registered plan, the plaintiff could not have redeemed her own land separately from the defendant's.

2. That redemption made on behalf of an owner of land may be ratified afterwards by the owner.

3. That the plaintiff was entitled to contribution.

McRAE v. CORBETT.

Extending time to appeal.

Time for appeal to the Supreme Court of Canada was extended where there had been only three days' default; where no sittings had been lost; and where such efforts to obtain security had been made that negligence could not be reasonably charged.

MORDEN v. MUNICIPALITY OF SOUTH DUFFERIN.

Constitutional law—Interest upon taxes.

A Provincial statute provided that all parties paying taxes prior to a certain date should be entitled to a reduction of ten per cent.; and that there should be added to all taxes unpaid upon a certain later date a sum of ten per cent.

Held, following *Schultz* v. *Winnipeg*, 6 Man. L. R. 35, that viewing the whole statute the amount to be added was in reality interest, and so the provision was *ultra vires*.

2. That the provision as to rebate was *intra vires*.

CANADIAN PACIFIC R. W. CO. v. MUNICIPALITY OF CORNWALLIS.

Assessment and taxes—Exemption from taxes—Lands of railway company in N.W.T. becoming part of Manitoba—Recovery of taxes paid under protest.

The 16th sec. of the contract made with the Canadian Pacific R. W. Co. provided that "the lands of the company in the N.W.T. until they are either sold or occupied shall also be free from such taxation for 20 years after the grant thereof from the Crown."

Certain lands which were in the N.W.T. at the date of the contract became part of the Province of Manitoba prior to the time at which they were acquired by the railway company.

Held, that such lands were within the terms of the contract.

While such lands were exempt from taxation the municipality assumed to tax and sell them. The municipality itself became the purchaser, and shortly after the sale paid to the school trustees and Judicial District Board their share of the taxes. Just prior to the period allowed for redemption the railway company paid, under protest, the amount demanded by the municipality, and sued for its recovery.

Held, that the payment could not be construed into a voluntary payment and was therefore recoverable, inclusive of the amount paid by the municipality to the school trustees and the Judicial District Board.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [8TH JANUARY, 1890.

HENDERSON v. KILLEY.

Partnership—Dissolution—New firm—Novation — Trust — Right of third person to enforce.

K. and M. carried on business under the name of K. & Co., and dissolved partnership, K. giving to M. sixteen promissory notes for $500 each, with interest, for M.'s share in the business, which was continued by K. K. afterwards formed a partnership with O., and by the articles of partnership transferred to the co-partnership, as his contribution to the capital, all the assets of his business, subject to the deduction therefrom of his liabilities, which were to be assumed by the co-partnership and charged against him. Amongst K.'s liabilities, known to O., were ten of the notes which M. had indorsed over to the plaintiff before maturity, and the assets transferred to the co-partnership were sufficient to pay all K.'s liabilities including these notes. The firm of K. & O. paid two of the notes and also paid interest on another note, and some negotiations took place between the plaintiff and the firm of K. &. O. for an extension of time for payment of the unpaid notes.

Held, BURTON, J.A., dissenting, reversing on this point the judgment of the Queen's Bench Division, 14 O. R. 137, that no trust was established in favour of M. by the co-partnership agreement between K. & O., and that the plaintiff, as assignee of M., was not entitled to enforce as against O. the performance of the stipulation in the deed for payment of the notes held by her.

Gregory v. *Williams*, 3 Mer. 582, and *In re Empress Engineering Co.*, 16 Ch. D. 125, specially considered.

But *per* HAGARTY, C.J.O., that the evidence established that an independent agreement had been entered into between the firm of K. & O. and the plaintiff to pay the notes in question.

The Court being thus divided in opinion, the appeal was dismissed with costs.

Robinson, Q.C., and *MacKelcan*, Q.C., for the appellants.
Osler, Q.C., and *Teetzel*, for the respondent.

[13TH MAY, 1890.

REGINA v. COUNTY OF WELLINGTON.

Constitutional law—British North America Act—Bankruptcy and insolvency—Banking and incorporation of banks—Property and civil rights—Crown—Taxation—Tax sale—R. S. O. c. 193, s. 7, s-s. 1.

Certain lands, after the grant from the Crown, became by certain mesne conveyances the property of the Bank of Upper Canada, and upon the failure of that bank were conveyed to its trustees, and were subsequently with the other assets of the bank vested in the Crown by 33 V. c. 40 (D.). The Crown then sold them, and the purchaser gave a mortgage back to secure part of the purchase money. The mortgage contained the usual provision for payment of taxes, but the taxes were not paid and the lands were sold, this action being brought to set aside the sale.

Held, *per* HAGARTY, C.J.O., and OSLER, J.A., that the Act 33 V. c. 40 (D.) was *intra vires*, being properly to be regarded as one dealing with "bankruptcy and insolvency" or "banking and incorporation of banks"; that the lands were therefore properly vested in the Crown as trustee; and that the interest of the Crown as mortgagee and trustee could not be sold for arrears of taxes, but was exempt under R. S. O. c. 193, s. 7, s-s. 1.

Per BURTON, J.A., that the Act was *ultra vires* as an interference with "property and civil rights in the Province," and that the lands remained in the trustees subject to taxation; that even if the Act was *intra vires*, still the lands, being vested in the Crown in the place and stead of the trustees voluntarily selected by the shareholders of the bank, were not exempt from taxation.

Per MACLENNAN, J.A., that the Act was *ultra vires* and the lands subject to taxation, but that upon the evidence the sale

was fraudulent and void as far as the interest of the Crown was concerned.

The judgment of the Queen's Bench Division, 17 O. R. 615, was therefore affirmed; BURTON, J.A., dissenting.

Bain, Q.C., and *Kappele*, for the appellants.

H. D. Gamble and *H. L. Dunn*, for the respondents.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

C. P. D.] [28TH JUNE, 1890.

OWEN SOUND STEAMSHIP CO. v. CANADIAN PACIFIC R. W. CO.

Railways—Joint traffic agreement—Ultra vires.

This was an appeal by the defendants and a cross-appeal by the plaintiffs from the judgment of the Common Pleas Division, 17 O. R. 691, both of which came on to be heard before this Court on the 19th and 20th of May, 1890.

D. E. Thomson, Q.C., and *George Bell*, for the plaintiffs.

McCarthy, Q.C., and *G. T. Blackstock*, for the defendants.

The appeal and cross appeal were dismissed with costs.

The Court held, for substantially the same reasons as those given in the Court below, that the agreement between the plaintiffs and the Toronto, Grey, & Bruce Railway Company was a valid agreement, and they therefore did not discuss the question as to the validation of that agreement by the subsequent legislation.

The Court agreed with the Court below upon the question of the termination of the agreement.

DOAN v. MICHIGAN CENTRAL R. W. CO.

Negligence—Contributory negligence—Railways—Pleading—"Not guilty."

This was an appeal by the defendants from the judgment of the Common Pleas Division, 18 O. R. 482, and came on to be heard before this Court on the 19th of May, 1890.

H. Symons, for the appellants.

G. T. Blackstock, for the respondent.

The Court allowed the appeal with costs and restored the judgment of STREET, J., at the trial.

The Court held that evidence of contributory negligence would properly be admissible under a defence of "not guilty" without any special plea of contributory negligence, and that at any rate in this case, even if strictly speaking the evidence were not admissible as the pleadings stood, still, the evidence having been given without objection, the plaintiff could not afterwards complain.

The Court also held that, upon the evidence, the finding of the jury as to contributory negligence was a proper one, and that the action therefore failed.

ROSE, J.]

CAMERON v. CUSACK.

Fraudulent conveyance—Intent to defeat creditor.

A conveyance made by a debtor in good faith of his assets to pay his existing debts cannot be impeached by one who at the time has a right of action against him for a tort and subsequently recovers judgment, even though the conveyance is made because of the threatened action.

Judgment of ROSE, J., 18 O. R. 520, reversed.

J. M. Glenn, for the appellant.

J. S. Robertson, for the respondent.

FALCONBRIDGE, J.]

ERIE AND NIAGARA R. W. CO. v. ROUSSEAU.

Railways—Lands acquired for railway purposes—Adverse possession—Statute of Limitations.

A title by adverse possession may be acquired as against a railway company to lands originally obtained by them for railway purposes.

Bobbett v. *South Eastern R. W. Co.*, 9 Q. B. D. 424, approved.

Judgment of FALCONBRIDGE, J., affirmed.

H. Symons, for the appellants.

H. H. Collier, for the respondents.

C. C. WENTWORTH.]

GOODMAN v. BOYES.

Statute of Limitations—Acknowledgment.

An acknowledgment of a debt, not being a debt by specialty, to be sufficient under the Statute of Limitations must be made to the creditor or to his agent. A general acknowledgment of liability or an acknowledgment to a third person will not be sufficient.

Judgment of the County Court of Wentworth affirmed.

Teetzel, Q.C., for the appellant.

W. Bell, for the respondent.

C. C. HASTINGS.]

BONISTEEL v. SAYLOR.

Contract—Bills of exchange and promissory notes—Illegality—Public policy.

The plaintiff purchased from an alleged company fifteen bushels of hull-less oats, paying therefor $10 a bushel and receiving the company's bond to sell for him thirty bushels of oats at the same price. The company found in the defendant a purchaser of thirty bushels of oats and the plaintiff's oats were sold to him and his notes for $300 transferred to the plaintiff. This was but one of a very large number of similar transactions, and both the plaintiff and the defendant were aware of this. The oats were not worth more than ordinary oats and the transactions were in fact speculative and fraudulent.

Held, BURTON, J.A., dissenting, that the transaction could not be dealt with as an isolated one, but that the whole scheme must be looked at; that the tendency of that scheme was clearly contrary to the general well being of the public; and therefore that the transaction in question forming a part of that scheme was against public policy and illegal.

Judgment of the County Court of Hastings affirmed on other grounds.

Moss, Q.C., and *J. H. Simpson*, for the appellant.

Clute, Q.C., for the respondent.

ASHLEY v. BROWN.

Assignments and preferences—Creditor—Knowledge of insolvency—R. S. O. c. 124.

One who has a right of action for tort and subsequently recovers judgment is not a creditor within the meaning of the Assignments and Preferences Act, so as to be in a position to attack a transaction entered into by the tort-feasor before the action was commenced.

Where a transaction is attacked under that Act, knowledge by the transferee of the insolvency of the transferor must be shown.

Johnson v. Hope, 17 A. R. 10, adhered to.

Judgment of the County Court of Hastings affirmed.

Moss, Q.C., and *Clute*, Q.C., for the appellant.

Watson, Q.C., and *Redick*, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 27th June, 1890.

In re LONG POINT CO. v. ANDERSON.

Game—Feræ naturæ—Property of owner of land in deer found thereon—29 & 30 V. c. 122—R. S. O. c. 221, s. 10—Construction of—Prohibition—Division Court—Undisputed facts—Error in law—Misconstruction of statutes.

The defendant killed upon his own land, which adjoined that of the plaintiffs and was unfenced, a deer one of the progeny of certain deer imported by the plaintiffs and allowed to run at large upon their land.

Held, that the deer was *feræ naturæ* and, having been shot by the defendant upon his own land, belonged to him.

Held, also, that neither the Act incorporating the plaintiffs, 29 & 30 V. c. 122, nor R. S. O. c. 221, s. 10, vested the absolute property in the deer in the plaintiffs.

Prohibition was granted to a Division Court where there were no facts in dispute and the Judge in the inferior Court applied a wrong rule of law to the facts and grounded his judgment upon a misconstruction of the Acts above referred to.

W. M. Douglas, for the plaintiffs.

C. E. Barber, for the defendant.

GRAHAM v. McKIMM.

Libel—Article referring to advertisement published contemporaneously—Fair criticism—Evidence—Plaintiff's case—Production of advertisement—New trial.

The plaintiffs brought a written advertisement to the defendant for the purpose of having it published in his newspaper, but the defendant refused to insert it, and the plaintiffs took it away intimating that it would be immediately published in another newspaper. It was so published; and on the day of its publication an article, written before its publication, appeared in the defendant's newspaper, referring to it as unfit for publication. The plaintiffs sued the defendant for libel. The trial Judge told the jury that if the article was nothing more than a fair criticism of the advertisement, it was not libellous. It was objected that the defendant was not entitled to criticize the advertisement because it had not been published before the article criticizing it.

Held, that this was not a valid objection.

The trial Judge ruled that the plaintiffs were bound to produce and put in as part of their case the written advertisement referred to by the defendant in the article complained of; and the plaintiffs, though protesting, accepted the ruling and put in the evidence.

Held, that the ruling was wrong; but that the plaintiffs were not entitled to a new trial, as the only injury to the plaintiffs was to let the defendant's counsel have the last word with the jury.

The statement in Odgers, Bl. ed. p. 573, that "if the alleged libel refers to any other document the defendant is also entitled to have the document read as part of the plaintiff's case," is too broad.

Watson, Q.C., for the plaintiffs.

W. Read, for the defendant.

HEPBURN v. TOWNSHIP OF ORFORD.

Ditches and Watercourses Act, 1883—Work not in accordance with award—Remedy—Costs.

Where an award has been made under the Ditches and Watercourses Act, 1883, the only remedy for the work not being completed in accordance with the award is the remedy provided by s. 18 of that Act. An action for damages was therefore dismissed.

Murray v. *Dawson*, 17 C. P. 588, followed; and *O'Byrne* v. *Campbell*, 15 O. R. 339, distinguished.

No other or greater costs were allowed to the defendants than if they had successfully demurred instead of defending and going down to trial.

Aylesworth, for the plaintiff.

W. R. Meredith, Q.C., *McKillop*, and *Charles MacDonald*, for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 9TH JUNE, 1890.

CITY OF KINGSTON v. CANADA LIFE ASSURANCE CO.

Assessment and taxes—Insurance company—Head office and branch office—Assessment of income at branch office—R. S. O. c. 193.

Held, reversing the decision of FERGUSON, J., 18 O. R. 18, that the amount of premiums received year by year by the defendants at Kingston were not assessable there.

"Income" as commercially used means the balance of gain over loss in the fiscal year or other period of computation, and this is the meaning of the word in the Assessment Act.

No distinct integral part of the defendants' income was referable to Kingston.

The ultimate profit (if any) of the whole business of the company represents the year's taxable income.

Kingston was not a branch at which any sum, arbitrary or otherwise, could be assessed as "income."

The argument *ab inconvenienti* applies cogently to exclude "income" as an item of "personal property" to be assessed at a "branch" which is entirely in subordination to the principal seat of business.

McCarthy, Q.C., and *Bruce*, Q.C., for the defendants.

Walkem, Q.C., and *Langton*, for the plaintiffs.

[30TH JUNE, 1890.

DOMINION BANK v. BELL.

Examination—Right of witnesses to presence of counsel—Special circumstances.

In an action against the maker and indorser of a promissory note judgment went by default against the indorser, but the

maker appeared and upon the consent of the plaintiffs obtained an order under Rule 566 for the examination before a special examiner of the indorser and his book-keeper before delivery of defence, the object being to shew that the indorser alone was liable on the note, that he procured it by fraud from the maker, and that the plaintiffs held it with notice.

Held, that the interests of the indorser as a party might be affected by the examination, and that he was entitled to have counsel present upon the examination to protect his interests.

Shepley, Q.C., for the defendant Bell and the witness Callaghan.

C. Millar, for the defendant Jay.

J. D. Montgomery, for the plaintiffs.

[BOYD, C., 4TH JUNE, 1890.

BANK OF COMMERCE v. MARKS.

Partnership—Agreement to pay debts of old firm—Privity—Liability of new firm to creditors.

G. M. and J. B. D., trading under the firm name of M., D., & Co., became indebted on certain promissory notes to the plaintiffs. G. M. left the firm and S. M. formed a partnership with J. B. D., and continued the business under the same firm name, and this new firm agreed to assume the liabilities of the old firm.

Held, that the plaintiffs had no right of action against the new firm, merely because the latter had, pursuant to their agreement with the old firm, made certain payments on account of the notes to the plaintiffs; nor because, apparently under a mistake of law, the new firm had asked for an extension of time from the plaintiffs.

W. Cassels, Q.C., for the plaintiffs.

Laidlaw, Q.C., for the defendant Playfair.

J. J. Scott, for the defendant Balfour.

[FERGUSON, J., 10TH MAY, 1890.

MACKLIN v. DOWLING.

Sale of lands—Title—Private Acts—Equitable interest in mortgage—Trustee and cestui que trust—Outstanding equity.

On a reference as to title in a specific performance action it appeared that one E. N. H. in 1861, through the Canada Agency

Association, agreed to advance to certain mortgagors $7,430 at interest; that the association agreed with E. N. H. to become liable to her for interest at seven per cent. per annum on this sum, and in consideration of this were to receive to their own use all interest above that rate, and that the security for the money should be vested in trustees.

Accordingly the mortgage, which bore date 4th May, 1861, was made to T. G. R. and D. B., trustees appointed by the directors of the association. On 23rd January, 1869, 32 V. c. 62, s. 5, was passed whereby all lands, mortgages, securities, etc., held by trustees of the association were vested in the Colonial Securities Company; and on 23rd September, 1872, the mortgagor released his equity of redemption to the Colonial Securities Company in full satisfaction of the mortgage moneys, but not so as to merge the mortgage.

On 29th March, 1873, 36 V. c. 121, s. 5, was passed whereby all lands, mortgages, and securities of the Colonial Securities Company were vested in the Colonial Trusts Corporation.

On 12th January, 1878, the Colonial Trusts Corporation conveyed the lands to the plaintiff, the present vendor.

Held, that the above Acts could not have the effect of operating the destruction of the rights of E. N. H. as *cestui que trust*, whose right, if the moneys advanced had not been repaid, would be (she adopting the transaction of the trustees in taking the release) to the lands, or to the mortgage plus the equity of redemption in case there was no merger.

There was therefore an equitable interest outstanding, if E. N. H's claim had not been satisfied, and this interest was not necessarily a matter of incumbrance or conveyancing, but of title.

Bruce, Q.C., for the plaintiff.

Bicknell, for the defendant.

[ROBERTSON, J., 14TH MAY, 1890.

ELLIOTT v. BUSSELL.

Husband and wife—Money paid by wife for use of husband—Corroborative evidence.

Where in the administration proceedings of an estate of a deceased testator, it appeared that the plaintiff, his widow, had paid at the testator's request out of her separate property cer-

tain premiums payable by him on two life assurance policies on his own life; and the plaintiff swore that she was to be repaid the amounts so paid by her:—

Held, that on the plaintiff claiming these moneys in the administration proceedings the onus was on the defendant, the executor, to show that they were a gift from the plaintiff to the testator; and that it was not incumbent on the plaintiff to prove that the moneys were to be repaid to her before she could recover.

Laidlaw, Q.C., for the defendant.

Kilmer, for the plaintiff.

[22ND MAY, 1890.

BRUYEA v. ROSE.

Action of trespass—Occupant of Crown lands—Possession by tenant—Statute of Limitations.

The result of the cases appears to be that where a person is in possession with the assent of the Crown paying rent as in *Harper* v. *Charlesworth*, 5 B. & C. 574, or where a person is a purchaser, although the patent has not issued, such person can maintain trespass against a wrong-doer.

A tenant taking in land adjacent to his own by encroachment must, as between himself and the landlord, be deemed *prima facie* to take it as part of the demised land; but that presumption will not prevail for the landlord's benefit against third persons.

Dickson, Q.C., for the plaintiffs.

Clute, Q.C., and *Burdett*, Q.C., for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 27TH JUNE, 1890.

McLEAN v. BRUCE.

Receiver—Residuary estate under will—Cross-examination of executor and residuary legatee—Account of debts and legacies unpaid.

In answer to the defendant's application for a receiver to receive the interest of the plaintiff as residuary legatee under a will, of which he was also the surviving executor, the plaintiff filed an affidavit in which he stated that the estate was

insufficient to pay the debts and specific legacies, and that there would be no sum coming to the plaintiff as residuary legatee.

Held, that the plaintiff upon cross-examination upon his application must answer as to whether there were any and what debts and legacies unpaid.

H. Cassels, for the plaintiff.

Hoyles, Q.C., for the defendant.

FULTON v. VIPOND.

Costs—Depriving successful party of—"Good cause"—Rule 1170—Reversing decision of trial Judge—Application at trial.

The Court can interfere with the trial Judge's discretion in depriving a successful party of costs in an action tried by a jury, where he has given effect to considerations which do not constitute "good cause" within the meaning of Rule 1170.

The plaintiff's principal claim, upon which he succeeded, was for wood cut and removed by the defendant. The trial Judge ruled that the conduct of the plaintiff in refusing a remeasurement caused unnecessary litigation, and he deprived him of the costs of that claim.

The plaintiff and defendant had each had a measurement made, and differed as to the result. The plaintiff refused to have a remeasurement and brought the action, the result of which shewed that his measurement was correct.

Held, that the plaintiff's refusal was not misconduct inducing the litigation, and there was no "good cause" for depriving him of costs.

Huxley v. *West London Extension R. W. Co.*, 14 App. Cas. at pp. 33-4, specially referred to.

Rule 1170 provides that where an action is tried by a jury the costs shall follow the event, unless, upon application made at the trial for good cause shewn, the Judge otherwise orders.

Semble, that there must be substantially an application at the trial, and if the trial Judge anticipating the application of counsel makes the order in presence of opposing counsel, he makes it on application.

D. W. Saunders, for the plaintiff.

Hoyles, Q.C., for the defendants.

NEW BRUNSWICK.

In the Supreme Court.

[27TH JUNE, 1890.

KINNY v. CRAIG.

Promissory notes—Action on—Agreement for sale of chattel—Warranty—Cross-action—Consideration.

This was an appeal from the Carleton County Court. The action was brought on two promissory notes made by the defendant to the plaintiffs for the price of a pump, which the defendant at first said he did not want. Subsequently, however, he agreed that the plaintiffs should put the pump in and that if it worked to his satisfaction he would keep it. One of the plaintiffs said "I'll warrant it to work; if it don't work I don't want any pay." The pump was put in and worked for three or four days, when the pipe broke and after being repaired worked for two days but not after that. The notes were not given until the pump was in and working. The jury found for the defendant.

The plaintiffs now appealed and contended that there was no total failure of consideration and at the most the transaction amounted to nothing more than a sale with a warranty, for which the remedy should have been a cross-action on such warranty, and also that the plaintiffs were entitled to notice that the pump did not work and to a return of the pump.

Held, that the transaction was not in the nature of a sale with a warranty but an agreement that the pump should work, and therefore the verdict should stand.

J. A. Vanwart, for the appellant.

Blair, A.-G., for the respondent.

BABINEAU v. BABINEAU.

Affidavit—Cause wrongly entitled—Motion to enter refused.

This was an application by the defendant for leave to move for a new trial and to give the necessary notice of the grounds at the next term, on an affidavit explaining the reason why the application was not made on the first day of the term. The

affidavit was entitled "Antoine Babineau, plaintiff, and Elear Babineau, defendant." The application was opposed by an affidavit of the plaintiff's attorney stating that the suit was brought against Elear Babineau, junior, and that he was so described in the summons, declaration, and other proceedings in the cause.

Held, that the objection could not be got over and that the affidavit on which the application was made could not be read. Application refused without costs, as none were asked for by the plaintiff.

D. Jordan, for the applicant.

G. W. Allen, contra.

MERCHANTS' BANK OF HALIFAX v. HARNETT.

Jury—Unanimous verdict—Subsequent statement of two jurors not a ground for a new trial.

This was a motion for a new trial. The jury had returned their verdict within two hours. The principal ground relied on was that two of the jury were deceived in thinking that a majority of their number could bring in a verdict at any time. It appeared that after the jury had been dismissed and the Court had adjourned, two of the jurors came forward and stated that they had not consented or agreed to the verdict as recorded, but had not made such opposition known at the time, because they believed that a majority could render a verdict at any time.

Held, that the practice of allowing a jury or a part of them to come into Court in this way was a dangerous one and should not be encouraged or allowed; and the motion was refused.

TOWN OF MILLTOWN v. BOARDMAN.

Treasurer of corporation—Mixing corporation funds with his own—Burglary—Bailee—Treasurer liable.

The defendant had been treasurer of the town, and as such had received and paid out its revenues. He had a safe in which moneys belonging to himself and the town had been kept, and while a certain sum of money was in the safe it had been opened and the money stolen. It appeared from the defendant's own evidence that he had not kept the town funds separate from his

own either in the safe or bank, but that he had been accustomed to put the town funds and his own together in both safe and bank, and that he did not know how much money belonging to the town was in the safe at the time of the burglary. The jury found a verdict for the plaintiffs for the amount claimed. This was a motion for a new trial on the ground that the defendant was not personally liable, inasmuch as he was only bailee of the funds and could only be held responsible for reasonable care and protection of the funds in hand.

Held, that this contention could not hold in this case, as the defendant had not kept the funds of the town separate from his own.

George J. Clarke, for the plaintiff.

M. McMonagle, for the defendant.

CLARK v. SCHOFFIELD.

Judge—Disqualification—Son interested in suit—Decree reversed—Costs.

This was an appeal from the Judge in Equity. At the hearing it was made to appear that a son of the Judge was interested in the suit, and objection was then taken that the Judge had no right to hear and determine the cause. The objection was overruled, and the case proceeded to a decree, which was on the above ground appealed from to this Court.

Held, that the objection was a valid one; and that the Judge had no right to try the case; and it was ordered that the appeal be allowed and the decree appealed from reversed, with leave to the defendants to make an application to any Judge other than the Judge in Equity to hear their application; the appellant to have his costs of the appeal and of the hearing before the Judge in Equity.

Pugsley, S.-G., for the appellant.

Weldon, Q.C., for the respondents.

BELL v. GIBERSON.

Breach of promise of marriage—Judge's charge—Misdirection—Feelings of family and friends—New trial.

This was an action for a breach of promise of marriage. The defendant after his promise and engagement for marriage with

the plaintiff seduced her and she became pregnant. After fixing and postponing the day of marriage several times he ultimately refused to marry the plaintiff, who thereupon brought this action. In his charge to the jury the Judge after reciting the circumstances said to them "you have a right to consider her (the plaintiff's) feelings and the feelings of her family and her friends, her altered relations in the community, her altered social relations."

The jury returned a verdict for the plaintiff for $4,000, the full amount claimed. On a motion for a new trial,

Held, that the Judge was wrong in directing the jury in making up the amount of damages to consider the feelings of the plaintiff's family and friends; and a new trial was ordered.

George F. Gregory, for the plaintiff.

J. A. Vanwart and *A. B. Connell*, for the defendant.

Ex parte CAMPBELL.

Canada Temperance Act—Territorial jurisdiction.

Held, that a commissioner of a Parish Civil Court has no jurisdiction to try a case for the violation of the Canada Temperance Act where the violation complained of has been committed in another parish.

FISHER v. TURNBULL.

County Court appeal—Repudiated agreement—Special assumpsit—Non-delivery of cheque—Non-suit reversed.

The defendant wrote the plaintiff a letter in reference to an overdue note for $20, complaining of non-payment and remarking, "Can you respect yourself if you repudiate your promise?" To which the plaintiff replied, "I have now in my possession an agreement that you repudiated." The defendant answered this and said, "produce that repudiated agreement and I will hand you a cheque for $50." Subsequently the parties met and went to the plaintiff's office where he produced and showed the defendant a subscription paper signed by the defendant and others, and addressed to Thomas De Blois, in which the defendant had agreed to subscribe and give all the assistance in his power in adding to the subscription for a news room. De Blois

stated at the trial that the defendant told him that the person who circulated the petition urged him to sign the paper, as his signature would induce others to do so and with that understanding that he was not to be called upon to pay. The defendant refused to give the plaintiff the $50 cheque which he demanded and this action was brought in the County Court for the delivery of the cheque. The Judge of the County Court granted a non-suit on the grounds : (1) that as the action was substantially for the recovery of $50 it ought have been brought in the City Court, and (2) that no repudiated agreement was shewn, the signing of the paper being a mere favour done at the request of the person acting for De Blois, upon which it was mutually understood that no liability should attach to the defendant. Upon appeal to this Court by the plaintiff,

Held, that the decision of the County Court Judge was wrong and that the defendant could not limit a written liability by any verbal understanding or agreement at the time the written obligation was made.

W. B. Wallace, for the appellant.

Alward, for the respondent.

COCHRAN v. GRAHAM.

Attorney - Acting without practising certificate—Judgment set aside.

This was an application by the defendant to set aside a judgment in the Saint John County Court. The appellant's attorney had as such signed the confession of judgment, but at the time had not taken out his practising certificate.

The application was allowed and the cause ordered back to the County Court Judge to decide questions of fact.

A. J. Gregory, for the applicant.

J. L. Carleton, for the plaintiff.

DUFFY v. WRIGHT.

Malicious prosecution—False pretences—Reasonable and probable cause—Non-suit.

W., who was a minor, went to the plaintiff's store and obtained a suit of clothes on his mother's credit. When asked to pay the bill the mother refused, alleging that her son had no authority

from her to obtain the goods. D. laid information against the son for obtaining goods under false pretences, and he was remanded, tried, and acquitted. The son then brought an action for malicious prosecution and obtained a verdict subject to leave to appeal.

Held, there was reasonable and proper cause for the arrest of W.

Appeal allowed with costs and cause ordered back to the County Court Judge to enter non-suit.

Blair, A.-G., for the appellant.

George F. Gregory, for the respondent.

Ex parte WHITE.

Tampering with a witness—Conviction—Necessary proof—Two allegations not double—Certiorari.

This was an application for a *certiorari* to remove a conviction against the applicant under R. S. C. c. 106, s. 121, for tampering with a witness, on the grounds:

(1) That there was no evidence before the magistrate of the proceedings against the party charged with a violation of the Canada Temperance Act, or of the conviction.

(2) That the conviction was bad, inasmuch as it was double, by charging that the applicant had tampered with the witness by offering him money and also by endeavouring to induce him by threats to absent himself from the trial.

Held, that there was evidence of the proceedings for the violation of the Canada Temperance Act before the magistrate, and that it was not necessary that the conviction for such offence should be proved, as the tampering had been committed before the conviction was made. Also that s. 107 of R. S. C. c. 178, covered the defect complained of in the conviction.

A. B. Connell, for the applicant.

S. B. Appleby, contra.

Ex parte PERKINS.

Canada Temperance Act—Two convictions on same day—Convictions good—Onus of proof.

P. was convicted of two first offences against the Canada Temperance Act on the same day, and applied for a certiorari on

the ground that the convictions were bad for uncertainty inasmuch as they did not state at what time of day each offence had been committed.

Held, following *Regina* v. *Marsh*, 25 N. B. Reps. 371, that the onus of proof was upon the defendant to shew the identity of the offences.

A. B. Connell, for the applicant.

S. B. Appleby, contra.

SINCLAIR v. JOHNSTON.

Trespass—Voluntary conveyance—Tenants in common—Assault—Misdirection—Improper questions for jury—Time at which plaintiff may elect—New trial.

This was an action for trespass brought by William Sinclair and Margaret his wife against John R. and James Johnston. W. J. bequeathed his interest in the property to William Sinclair and J. J. bequeathed her interest in the same property to Margaret, wife of William Sinclair. Judgment had been recovered against William Sinclair by John Sinclair and the interest of the plaintiff William had become vested in the defendant John R. Johnston by virtue of a sheriff's sale under execution on the judgment, but before the sheriff's deed had been made the plaintiff William Sinclair had made and registered a deed through Bell, a third party, to his wife Margaret. It was contended that this deed was made for the purpose of defeating the judgment and therefore void. At the trial the plaintiff swore that at the time the deed to his wife was made he did not know anything of the judgment against him and that he made the deed at his wife's request. There was also a count for an assault. At the trial several trespasses were proved and it was objected on the motion for a new trial that the plaintiffs should have been required at the close of their case to elect for which of the trespasses proved they intended to proceed. The Judge submitted several questions to the jury, among which were the following:—

"Did the defendants, or either of them, supposing that John R. Johnston was a tenant in common with Margaret Sinclair, interfere with the plaintiffs in the use of their property, which they held in common with John R. Johnston, or oust the plaintiffs, that is, turn them out of their property?

"Did William Sinclair, when he made the deed to Bell, do so for the purpose of avoiding the payment of the debt to John Sinclair?"

The jury answered the first question in the affirmative, assessing damages at $75, and the second in the negative, and also found for the plaintiffs on the others submitted with $5 for the assault.

Held, that there was misdirection on the question of ouster, as the jury might have considered that any occupation or use of the property by the defendants, though not amounting to an ouster of the plaintiffs, would entitle them to recover on the count. The question was therefore misleading. There must be an actual expulsion to enable one tenant in common to maintain trespass against his co-tenant.

Per ALLEN, C.J.—The proper question was not left to the jury in this case in respect to the conveyance from the plaintiff to Bell, and from Bell to Mrs. Sinclair. The transaction was in effect and was intended to be a voluntary conveyance from Sinclair to his wife. It is not necessary that a man should be actually indebted at the time he makes a voluntary settlement in order to make it fraudulent; for if he does so with a view of his being indebted at a future time, it is equally fraudulent.

Held, also, that there was nothing in the objection that the plaintiffs should have been required to elect at the close of their case for which of the several trespasses proved they intended to proceed. The time when a plaintiff should be required so to elect is a matter in the discretion of the Judge.

New trial ordered unless the plaintiffs should consent to reduce verdict to amount awarded for the assault.

Blair, A.-G., for the plaintiffs.

George F. Gregory, for the defendants.

MANITOBA.

In the Queen's Bench.

[KILLAM, J.

RIPSKIN v. BRITISH CANADIAN LOAN AND SAVINGS COMPANY.

Married woman—Separate trading—Evidence.

In an interpleader issue to try the right of a married woman to a stock of goods, as against a creditor of her husband:—

Held, 1. That the onus was on the married woman, the plaintiff in the issue.

2. That the statute does not protect a joint trading, or what would in the case of persons not husband and wife be a joint trading.

The stock of goods had originally belonged to a previous wife of the debtor. After her death the debtor conveyed it to S. R. for $875, in trust for the debtor's son, with a provision that the expense of disposing of the goods should be paid out of the purchase money. A year afterwards S. R. sold to the plaintiff for the same sum without any inventory being made or any of the usual precautions being taken. The plaintiff claimed to have been possessed of money at the time of her marriage, but her statement was not corroborated by any one. She asserted that it came from the estate of her deceased father but was unable to say whether she got all the estate or whether her brothers and sister got any of it. Her business consisted not only in the business connected with the stock in question but also in a series of speculations in other stocks of a character somewhat surprising in a woman of no previous business training. In connection with at least one of these her husband had some part, but she offered no evidence as to the extent of his interference in the business.

Held, that the evidence failed to establish the plaintiff's ownership.

[BAIN, J.

MERCHANTS' BANK v. GOOD.

Amendment at trial—Misjoinder of defendants—Statute of Limitations.

The plaintiffs issued a writ upon a note signed "J. G. & Co." against J. G. and W. G. Afterwards they struck out W. G. and moved to strike out the defence of J. G. He defended on the ground that he had a partner, but declined to give his name. The plaintiffs then amended by adding W. B., and went down to trial. The plaintiffs' evidence showed that not W. B. but S. B. was the partner, whereupon the plaintiffs moved to amend by striking out W. B. Since the commencement of the action the Statute of Limitations would have barred the remedy against S. B. The plaintiffs' evidence as to the circumstances under which the note was made was contradictory.

Leave to amend was refused, and a non-suit entered.

Supreme Court of Canada.

NOVA SCOTIA.] [12TH JUNE, 1890.

O'BRIEN v. COGSWELL.

Assessment and taxes—Halifax City Assessment Act, 1888—Lien—Priority of mortgage made before the Act—Construction of Act—Healing clauses—Effect and application of.

The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in that city a first lien thereon except as against the Crown.

Held, affirming the judgment of the Court below, 21 N. S. Reps. 155, 279, that such lien attached on a lot assessed under the Act in preference to a mortgage made before the Act was passed.

The Act provided that in case of non-payment of taxes assessed upon any lands thereunder the city collector should submit to the mayor a statement in duplicate of lands liable to be sold for such non-payment, to which statements the mayor should affix his signature and the seal of the corporation; one of such statements should then be filed with the city clerk and the other returned to the collector with a warrant annexed thereto, and in any suit or other proceeding relating to the assessment on the real estate therein mentioned any statements or lists so signed and sealed should be received as conclusive evidence of the legality of the assessment, etc. In a suit to foreclose a mortgage on land which had been sold for taxes under this Act the legality of the assessment and sale was attacked.

Held, per STRONG, TASCHEREAU, and GWYNNE, JJ., that to make this provision operative to cure a defect in the assessment caused by failure to give a notice required by a previous section it was necessary for the defendants to show affirmatively that the statements had been signed and sealed in duplicate and filed as required by the Act; and the production and proof of one of such statements was not sufficient.

Per RITCHIE, C.J., and PATTERSON, J., that it was sufficient to produce the statement returned to the collector signed and sealed

as required and with the necessary warrant annexed, and in the absence of evidence to the contrary it must be assumed that all the proceedings were regular and that the provision of the statute had been complied with.

The Act also provided that the deed to a purchaser of lands sold for taxes should be conclusive evidence that all the provisions with reference to the sale had been complied with.

Held, per STRONG, TASCHEREAU, and GWYNNE, JJ., that this provision could only operate to make the deed available to cure defects in the proceedings connected with the sale and would not cover the failure to give notice of assessment required before the taxes could be enforced.

Held, per RITCHIE, C.J., and PATTERSON, J., that the deed could not be invoked in the present case to cure any defects in the proceedings, as it was not delivered to the purchaser until after the suit commenced; therefore a failure to give notice that the land was liable to be sold for taxes, which notice was required by the Act, rendered the sale void.

Sedgewick, Q.C., and *Lyons*, for the appellants.

Lash, Q.C., and *McDonald*, for the respondents.

[13TH JUNE, 1890.

LAWRENCE v. ANDERSON.

Debtor and creditor—Assignment in trust—Release to debtor by—Authority to sign—Ratification—Estoppel.

L. brought an action against A. on an account stated, to which the defence set up was release by deed. On the trial it was shown that A. had executed a deed of assignment in trust for the benefit of his creditors and under authority by telegram had signed the same in the name of L. After the execution of the deed by A. the creditor L. continued, with knowledge of the deed, to send him goods, and about a month after he wrote to A. as follows:—"I "have done as you desired by telegraphing you to sign deed for "me, and I feel confident that you will see that I am protected "and not lose one cent by you. After you get matters adjusted "I would like you to send me a cheque for $800." . . . Four years after A. wrote to L. a letter in which he said: "In "one year more I will try again for myself and hope to pay you "in full." The account sued upon was stated some eighteen months after this last letter.

Held, reversing the judgment of the Court below, TASCHEREAU and PATTERSON, JJ., dissenting, that L. was not estopped from denying that he executed the deed of assignment; and as it was evident that he did not expect to participate in the benefit of the deed, but looked to the debtor A. for payment, he could recover on the account stated.

Held, per PATTERSON, J., that although A. had no sufficient authority to sign the deed for L., yet there was an agreement to compound the debt dehors the deed which was binding on L., and the understanding that L. was to be paid in full would be a fraud upon the other creditors of A.

Eaton, Q.C., for the appellant.

Newcombe, for the respondent.

CLARK v. CLARK.

Will—Construction of—Devise to two persons—Joint tenants or tenants in common—Severance.

The will of R. C. devised his real estate to his two sons, their heirs, executors, and assigns, and ordered that the sons should jointly and in equal shares pay the testator's debts and legacies granted by the will. There were six legacies given to two other sons of the testator, payable by the devisees in two, three, four, five, six, and seven years respectively. The estate vested in the devisees before the passing of the Act abolishing joint tenancies in Nova Scotia.

Held, reversing the decision of the Court below, 21 N. S. Reps. 378, TASCHEREAU and GWYNNE, JJ., dissenting, that the provisions for payment of debts and legacies indicated an intention on the part of the testator to effect a severance of the devise, and the devisees took as tenants in common and not as joint tenants.

Fisher v. *Anderson*, 4 S. C. R. 406, followed.

On the trial of a suit between persons claiming through the respective devisees to partition the real estate so devised, evidence of a conversation between the original devisees as to the manner in which they regarded their tenure of the estate was tendered and rejected.

Held, GWYNNE, J., dissenting, that such evidence was properly rejected.

Held, per GWYNNE, J., that the evidence could not have had the effect of assisting to explain the will, which was the ground upon which it was rejected at the trial, but it should have been received as evidence of a severance between the devisees themselves, joint tenants under the will.

Harrington, Q.C., for the appellants.

Borden, for the respondents.

NEW BRUNSWICK.]

PROVIDENCE WASHINGTON INSURANCE COMPANY v. GEROW.

Marine insurance—Construction of policy—Port on west coast of South America—Guano Islands—Commercial usage.

A vessel was insured for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, thence to the United Kingdom. She went to Valparaiso, and from there proceeded to Lobos, an island from twenty-five to forty miles off the west coast of South America, where she loaded guano and sailed for England. Having met with heavy weather, she returned to Valparaiso, and a survey was held by which it appeared that to repair her would cost more than she would be worth afterwards. The owner claimed payment under the policy for a constructive total loss, which was resisted on the ground of deviation in the vessel loading at a port off the coast. On the trial of an action on the policy evidence was given by ship-owners and mariners to the effect that by the usage of the shipping trade a loading port on the west coast of South America specified in the policy would include the Guano Islands lying off the coast. The jury found for the plaintiff.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the policy must be construed to mean what would be understood by shippers, ship-owners, and underwriters, and the jury having based their verdict on evidence of what such understanding would be, their finding could not be disturbed.

Straton, for the appellants.

Weldon, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [28TH JUNE, 1890.

MARITIME BANK v. STEWART.

Bankruptcy and insolvency—English Bankrupt Acts, scope of—Canadian creditors proving claim in England—Staying actions in Ontario—Discretion—Duration of stay.

The order of the Queen's Bench Divisional Court, 18 P. R. 232, affirming the order of ROSE, J., ib. 86, staying proceedings, was affirmed on appeal.

HAGARTY, C.J.O., and MACLENNAN, J.A., were of opinion that the order was properly made.

BURTON and OSLER, JJ.A., were of opinion that as an exercise of discretion the order should not be interfered with.

BURTON and MACLENNAN, JJ.A., were also of opinion that the order should be varied by making the stay "until further order," instead of "for ever."

Robinson, Q.C., and *Gormully*, Q.C., for the appellants.

McCarthy, Q.C., and *A. Ferguson*, Q.C., for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 27TH JUNE, 1890.

PECK v. AGRICULTURAL INSURANCE COMPANY.

Insurance—Fire—Unoccupied building—Special condition—Reasonableness—Information given to agent of insurance company, but not in application—Powers of agent—Evidence—Rejection of.

The defendants issued a policy of insurance against fire, dated 23rd April, 1889, upon a house of the plaintiff. The application signed by the plaintiff stated that the house was occupied as a residence by the plaintiff's son. A fire took place on the 14th

November, 1889, at which date and for six months previously the house had been unoccupied. One of the special conditions indorsed upon the policy was that if a building became vacant or unoccupied and so remained for ten days, the entire policy should be void. The plaintiff and his wife swore that when the agent came to him and drew the application he asked the plaintiff if there was anyone in the house at the time, and the plaintiff told him that his son was living there at the time, but was going to leave in about two weeks, and asked if that would make any difference, and was informed by the agent that it would not. By a clause in the application the plaintiff agreed that no statement made or information given by him prior to issuing the policy, to any agent of the defendants, should be deemed to be made to or binding upon the defendants unless reduced to writing and incorporated in the application; and on the margin of the application there was a notice shewing that the powers of agents were limited to receiving proposals, collecting premiums, and giving the consent of the defendants to assignments of policies.

Held, that the special condition referred to was not an unreasonable one, and that the agent had no power to vary it; and an action to recover the amount of the loss was dismissed.

The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants and a brother of the plaintiff for the purpose of shewing that the plaintiff, having become aware of them before the application made by him, was justified in believing that the defendants did not regard the condition as to occupation as a material one.

Held, that this evidence was properly rejected.

Clute, Q.C., for the plaintiff.

J. W. Kerr, for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 21ST JUNE, 1890.

REGINA v. BIRCHALL.

Criminal procedure—Jurisdiction—Chancery Divisional sittings.

Application to make absolute a rule *nisi* in a criminal matter.

Per BOYD, C.—The divisional sittings of the Court are now the equivalent for the former sittings in full Court in term at common

law, or for the purpose of rehearing in Chancery, and the criminal jurisdiction vested in the High Court not exercisable by a single Judge is by the effect of legislation to be administered by Judges composing these Divisional Courts. Each Division is to follow the same practice, and therefore the Chancery Division is empowered to use the criminal practice and procedure which was formerly peculiar or limited to the Common Law Courts.

Per FERGUSON, J.—Bearing in mind the provisions of Con. Rule 218, under which the sittings of the Chancery Divisional Court at the time of this application were taking place, it had not the power to exercise the full jurisdiction of the High Court, such as it would have possessed if sitting under the provisions of the original Marginal Rule 480, s-ss. (*a*) and (*b*), and had not a criminal jurisdiction. The other divisions of the High Court are not in the same position with regard to criminal jurisdiction.

Hellmuth, for the motion.

W. R. Meredith, Q.C., and *Hamilton Cassels*, contra.

[30TH JUNE, 1890.

WELLBANKS v. HENEY.

Fraudulent preference—Agreement to supply material for manufacture, the goods manufactured nevertheless to remain property of the supplier of the material—Defeating and delaying creditors.

Interpleader issue.

The claimant agreed with A., an insolvent, in writing, to furnish material to the latter for the manufacture of carriages from time to time for the period of one year; it being also provided that no property, title, interest, or ownership in such goods or merchandize should pass to, vest in, or belong to A., but that notwithstanding any improvement or work upon the same or change of form or addition thereto or use thereof, the same and every part thereof should be and remain the goods and property of the plaintiff.

The material was supplied and manufactured into carriages by A., which were seized by the defendants, execution creditors of A., and the claimant claimed the same, more being owing to him for the material supplied than the value of the goods seized.

Held, reversing the decision of ARMOUR, C.J., that the above agreement was not one which could be said necessarily to have the effect of defeating or delaying creditors, and in the absence of fraud the claimant was entitled to succeed on the issue.

C. H. Widdifield, for the plaintiff.

Alcorn, for the defendants.

MARTIN v. MAGEE.

Vendor and purchaser—Devolution of Estates Act—Devise of land—Payment of debts—Beneficial interest.

Held, that where one dies, since the Devolution of Estates Act, leaving a will devising lands, the land devolves upon the executors of the deceased as assets for the payment of debts; when these are paid (or there being no debts) the executors will hold the bare legal estate for the devisee of the land. In other words, subject to the payment of debts the beneficial interest in the land passes to the devisee and he can make title as the real owner. If the payment of the debts will exhaust the land and other assets there is no beneficial interest, but if the debts fall short of this in amount, the matter is in practically the same condition as with regard to any other incumbrance, *i.e.*, upon the charge or incumbrance being satisfied (which can be done out of the purchase money) the clear title can be conveyed.

E. D. Armour, Q.C., and *D. Macdonald*, for the plaintiff.

Hoyles, Q.C., and *James Chisholm*, for the defendant.

ABELL v. MORRISON.

Registry Act—Notice—Relief on ground of mistake—Subrogation.

On the 19th December, 1887, the plaintiff registered a lien against certain lands. On the day before the defendant, an intending purchaser, had searched the registry and found only two incumbrances registered against the property. On the 22nd December the defendant completed his purchase, and, having paid off the two incumbrances, registered discharges thereof with his deed of purchase, but as he did not make a further search he did not discover the plaintiff's lien.

Held, affirming the decision of FALCONBRIDGE, J., that the defendant was entitled to stand in the place of the incumbrancers whom he had paid off, and to priority over the plaintiff's lien.

The defendant did not mean to give priority to the plaintiff's lien, of which he knew nothing in fact. The Registry Act, which declares (s. 80) that registration shall constitute notice does not preclude inquiry as to whether there was knowledge in fact; and the Court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake.

Langton, for the plaintiff.

Moss, Q.C., and *J. S. Mackay*, for the defendant.

KEYES v. KIRKPATRICK.

Preference—Action by creditor obtaining leave under R. S. O. c. 124, s. 7, s-s 2—Compromise arrived at by assignee.

This was an action to set aside a bill of sale brought by a creditor in the name of an assignee for creditors, the plaintiff having obtained an order under R. S. O. c. 124, s. 7, s-s. 2, enabling him to bring the action, the assignee being unwilling to bring it.

It appeared that after service of the notice of motion for the order giving permission to bring the action, but before the order, the assignee, believing he had authority to do so, and with the approval of the inspectors, made a settlement with the defendants, in whose favour the bill of sale had been made, which settlement also it appeared was advantageous to the estate.

Held, that the settlement arrived at must be held good, and the judgment dismissing the action should be affirmed.

DuVernet, for the plaintiff.

W. Cassels, Q.C., for the defendants.

MORRIS v. MARTIN.

Interpleader issue—Mortgage of goods to secure wife barring dower—Payment of money into Court to abide further order.

In an interpleader issue with respect to goods (which had been sold pending proceedings) it appeared that they had been

included in a chattel mortgage given to the defendant in the issue for the purpose of securing her against loss, damage, costs, etc., that she might sustain or be put to by reason of her executing certain mortgages for the purpose of barring her dower.

Her husband was still living, so that it did not appear that she had yet sustained any such loss or damage.

Held, that the money, the proceeds of the goods, must remain in Court to abide further order, so that the defendant would have the same security that she had by the mortgage, and if she should not become entitled to the money, it would be available to her husband's creditors, the owner of the goods mortgaged.

Moss, Q.C., for the defendant.

C. J. Holman, for the plaintiff.

STRAUGHAN v. SMITH.

Seduction—Action by brother—Loss of services—Infant defendant—Non-appointment of guardian—Rules 261, 313.

In an action for seduction it appeared that the plaintiff was the brother of the girl seduced; and that the girl, though in the service of another person, yet (by agreement with her mistress entered into at the time of her engagement) was at liberty to perform and did perform certain services at home for the plaintiff.

Held, that the plaintiff was entitled to maintain the action.

It also appeared that the defendant was not quite of age and that no guardian had ever been appointed, but that the fact of infancy was well known to the defendant's parents and to the solicitor and counsel who appeared for him at the trial, and no objection on this ground was taken till this motion before the Divisional Court.

Held, that under Rules 261 and 313 the appointment of a guardian was not imperative; the Court had a discretion; and in this case refused to interfere with the judgment obtained against the defendant at the trial.

Bruce, Q.C., for the defendant.

Carscallen, Q.C., for the plaintiff.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 27TH JUNE, 1890.

MACLEAN v. THE BARBER AND ELLIS COMPANY.

Discovery—Inspection of document before delivery of statement of claim—Merits.

In an action to recover an amount alleged to be due by the defendants upon an advertising contract, after crediting an amount admitted to be due by the plaintiff to the defendants for rent, and also to recover damages for illegal distress for rent, it appeared that the defendants had agreed to pay a certain sum to the plaintiff for advertising, and had also written a letter to the plaintiff agreeing that a certain part of the rent should be taken out in advertising. This letter purported to be in answer to a letter written by the plaintiff making a proposal, which the defendants agreed to.

Held, that the plaintiff was entitled to have his own letter produced by the defendants for his inspection before delivery of his statement of claim, in order to enable him to frame it properly.

Hooey v. *Gilbert*, 12 P. R. 114, distinguished.

It is not necessary that an application by a plaintiff for inspection should be supported by a specific statement of merits, if from the material before the Court it can be determined whether the claim is or is not based upon merits.

T. S. Jarvis, for the plaintiff.

Kilmer, for the defendants.

In the County Court of the County of Lincoln.

[SENKLER, Co. J., 31ST DECEMBER, 1888.

In re CANADIAN PACIFIC R. W. CO. AND CITY OF ST. CATHARINES.

Assessment and taxes—Telegraph lines owned by railway company exempt from taxation—R. S. O. c. 193, s. 34, s-s. 2.

An appeal by the Canadian Pacific Railway Company from the decision of the Court of Revision for the city of St. Catharines in respect of the company's assessment for the year 1888.

Dugald J. MacMurchy, for the appellants.

F. W. Macdonald, for the city corporation.

SENKLER, Co. J.—The assessment complained of is entered on the assessment roll for the city of St. Catharines for 1888 as follows :

" Canadian Pacific Telegraph office, T. ; Richard Fitzgerald, P.—$1,400, real property ; $400, personal property."

The complaint is as to the personal property only. The contention of the appellants is that no such corporation exists as the Canadian Pacific Telegraph Company ; that the office of which the real property assessed consists, and in which the personal property assessed is said to be situate (such personal property consisting of furniture and instruments used in telegraphing) is rented by the Canadian Pacific Railway Company, which has constructed a telegraph line along the line of its railway, and has also constructed other telegraph lines connecting St. Catharines and other places with the telegraph line along the railway, as that railway company is authorized to do by s. 16 of its charter, 44 V. c. 1 ; that the business at the office in question is carried on by the Canadian Pacific Railway Company under this section and cannot be distinguished from the general business of the company ; that under the Assessment Act, R. S. O. 1887 c. 193, s. 34, s-s. 2,* the personal property of the Canadian Pacific Railway Company is exempt from assessment, the shareholders being liable to assessment on the income derived from the company.

Mr. Macdonald, the city solicitor, hardly disputed the correctness of this reasoning ; and, after considering the statutes referred to, I think it is sound.

The Canadian Pacific Railway Company has invested the principal part of its means in the railway within the meaning of the sub-section above referred to ; the telegraph lines are of secondary importance.

I therefore grant the appeal and strike off the assessment of $400 for personal property.

[On the 16th July, 1890, Ermatinger, Junior Judge of the County Court of the County of Elgin, followed the above decision and allowed an appeal of the same company in respect of a similar assessment of $1,000, the facts being admitted. In a subse-

*The personal property of a bank or of a company which invests the whole or the principal part of its means in gas works, water works, plank or gravel roads, railway and tram-roads, harbours, or other works requiring the investment of the whole or principal part of its means in real estate, shall, as hitherto, be exempt from assessment ; but the shareholders shall be assessed on the income derived from such companies.

quent appeal of the Bell Telephone Company, the same learned Judge came to the conclusion that the words "as hitherto" in R. S. O. 1887 c. 193, s. 34, s-s. 2, made it necessary to look at the former Acts, and that R. S. O. 1877 c. 180, s. 29, shewed that the companies whose personal property was intended to be exempted were those the whole or principal part of whose means was invested in real estate "already assessed;" and that it could not be contended that a company whose means were invested in exempted real estate could on that ground claim exemption of their personal property.]

NEW BRUNSWICK.

In the Supreme Court.

[4TH AUGUST, 1890.

McDONALD v. LESTER.

Trespass—Husband and wife—Husband liable.

This was an action of trespass for raising an embankment against the plaintiff's house causing dampness, and placing a water-spout to carry the water from their roofs so that all the water from the defendants' building ran against the plaintiff's building, injuring it and rendering it unhealthy. The property was owned by the female defendant, but she did not in any way interfere with the management of it or participate in the matters complained of. The jury found for the plaintiff. On a motion to enter a verdict for the female defendant or for a new trial:—

Held, that the wife could not be held liable for the grievances complained of; and a verdict was ordered to be entered for the wife, and against the husband.

McLeod, Q.C., for the plaintiff.

A. A. Wilson, for the defendant.

GROSVENOR v. MOORE.

Evidence—Written agreement—Parol evidence of collateral agreement—Admissibility of—New trial.

This was an appeal from the York County Court. The action was brought to recover the amount of a promissory note from the

defendant as indorser. The note in question was indorsed and delivered to the plaintiff in part payment of a property sold by him to the defendant, and an agreement signed by the defendant dated 16th June was put in evidence which stated the price of the property to be $1,700, and the taxes $26; that $150 in money had been paid and the defendant's note for $150 and two notes of D. amounting to $200 had been given to the plaintiff on the 13th June and $150 in cash on the 16th June, at the signing of the agreement, the balance to be paid on delivery of the deed. The defendant stated that on the 16th June, when he paid the further sum of $150 and signed the agreement, it was verbally agreed between them that in consideration of the defendant paying the $26 taxes the plaintiff would release him from liability as indorser on the D. note. There was nothing in writing on the note or in the written agreement to show the note had been indorsed without recourse. At the trial the County Court Judge held that evidence of this alleged verbal agreement was not admissible in contradiction to the written agreement. The jury found for the plaintiff. On appeal from this ruling :—

Held, that the agreement might be fulfilled by indorsed notes, whether indorsed with or without recourse, and which of these kinds it should be might depend upon parol evidence; and a new trial was ordered.

Blair, A.-G., for the plaintiff.

J. A. Vanwart, for the defendant.

PRESTON v. APPLEBY.

Distress for rent—Dispute as to amount—Agreement—Arbitration—Trespass.

This was an action of trespass. The plaintiff was tenant to the defendant, who had issued a distress warrant for rent due. There was a dispute about the amount of rent in arrear and it was claimed by the plaintiff that they had agreed to refer the matters in dispute to arbitration to find the amount of rent due and that the defendant should withdraw the distress warrant until the amount was decided upon. The defendant did not keep this agreement, but before the amount of rent due had been settled distrained and sold the goods of the plaintiff, who thereupon brought this action. The jury found that such an agreement had been made and assessed the damages at $500.

Held, that the defendant was liable, and a verdict was ordered to be entered for the plaintiff for $500.

G. G. Gilbert, Q.C., for the plaintiff.

H. A. McKeown, for the defendant.

KINNEALY v. MAYOR, ETC., OF ST. JOHN.

Municipal corporations—Negligence—Accumulations of ice and snow on the sidewalk—Corporation liable—Non-suit—New trial.

This was an action against a municipal corporation to recover damages for injuries sustained by a fall on the sidewalk. The accident occurred on 9th March, between eight and nine o'clock in the evening, at a place where there was quite a steep descent in the street. From the evidence it appeared that the snow had not been shovelled off the sidewalk all winter; that there was a ridge of ice in the centre of the path, and ice down on both sides of it; that the gutters had not been kept open; and that soon after the accident the ice was cleared away and the gutters opened. The plaintiff was non-suited at the trial on the ground that there was no liability under the city charter or any Act of the Legislature imposing on the corporation a liability to remove snow or ice from the sidewalks.

Held, per ALLEN, C.J., WETMORE, PALMER, and FRASER, JJ., (TUCK, J., dissenting) that if the condition of the sidewalk where the plaintiff fell was rendered dangerous by the accumulation of ice and snow and the defendants had allowed it to remain in that condition for a considerable part of the winter, this was evidence of negligence which should have been submitted to the jury; that there was no good reason why the fact that a street had become unsafe for people to walk upon, in consequence of the accumulation of ice and snow upon it, or from any other natural causes, should relieve the corporation from the obligation to remove the danger within a reasonable time, or render them less liable than they would be for negligently omitting to repair a dangerous defect in a planked sidewalk or an asphalt pavement—the principle governing the question of negligence being in both cases the same. A new trial was ordered.

Pugsley, S.-G., for the plaintiff.

I. A. Jack, for the defendants.

INCH v. FLEWELLING.

Trespass—Conventional line—When binding.

This was an action of trespass to land claimed by the plaintiff. The defendant was the owner of the adjoining lot to the south, subject to a life estate in his father. The substantial matter in dispute was the ownership of a spring near the dividing line. It was agreed between the parties to get a surveyor and have the line run out, each agreeing to abide by the result. The defendant employed K., a surveyor, who ran the line out. His line crossed the old division line in several places, but was generally to the south of it and was eight feet to the south at the spring, leaving it all on the plaintiff's lot. Both parties agreed to adopt this line, and also agreed to put up and did put up a division fence on K.'s line, part being made by each of them. The defendant sowed grain up to this fence, though in previous years he had cropped to the north of it and up to the old dividing fence on the land. After K. had run the line the defendant had on several occasions said that he had lost the spring but that he was satisfied, as all he wanted was his own and now he knew where his land was. About five months after K.'s line was run, the defendant, without notice to the plaintiff, employed another surveyor, who made the line pass to the north of the spring, but if this second line had been continued to the rear it would have intersected the plaintiff's rear line about two rods to the north-east of a cedar stake that had always been agreed upon as the north-east angle of the plaintiff's lot. The defendant then threw down the fence which had been put up during the previous summer upon the K. line and erected another on the new line. It was for throwing down this fence on the K. line and erecting another on the new line that this action was brought. The jury found for the plantiff. On a motion for a new trial :—

Held, per ALLEN, C.J., TUCK and FRASER, JJ., (WETMORE, J., dissenting) that as there was no fraud used to induce the defendants to consent to the K. line and as they did not do so under any erroneous belief as to the effect of such consent, they were bound by the conventional line agreed and acted upon by each. Both the defendant and his father knew exactly how K.'s line affected the spring they were contending for, and it was on ground for repudiating K.'s line, after agreeing to it, and acting

upon it, as he did for five months, that he had changed his mind in consequence of the last survey or otherwise, and regretted what he had deliberately done.

Blair, A.-G., for the plaintiff.

L. A. Currey, for the defendants.

KIRKPATRICK v. ARMSTRONG.

Statute of Limitations—Heir dividing property with widow—Dower—Misdirection—New trial.

This was an action of ejectment. The plaintiffs claimed as the heirs of John Morrisson, who died in 1845, and who was the brother and heir of William Morrisson, who died intestate in 1836 in possession of the property in dispute, leaving a widow surviving him, but no children. The widow remained in the occupation of the deceased husband's house, John Morrisson, the brother, and his family also living there. In the course of the summer of 1837 John Morrisson and the widow, after obtaining legal advice as to their respective rights in the property, divided the growing crop equally between them, and after harvesting in the same year divided the land also equally between them by metes and bounds, but without any deed or writing, and this division continued to be regarded by each to the time of the widow's death in 1883. After John Morrisson's death one of his heirs requested the widow to have a proper division made of the land, but she said she did not wish to be bothered by it and nothing was done. In 1872 the defendant went into possession of the land in dispute (being a part of the land which had been set off for the widow), under a deed from the devisee of her deceased husband who had previously occupied the land. The defence relied upon the possession of upwards of twenty years in the widow. The question left to the jury and upon which they found for the defendant was :—" Whether the division of the land made between John Morrisson and the widow was the setting off her right of dower in the property or an absolute division of the land between them ? "

Held, per ALLEN, C.J., KING and FRASER, JJ., (WETMORE J., dissenting) that this question should not have been left to the jury. William Morrisson having died in possession of the land, it was *prima facie* evidence that he was seized in fee of it, and on

his death the title vested in his heirs subject to the widow's right of dower. There was no presumption that she had remained on the property in any other character than as his widow; whatever she might have thought about her right she had no title in the property; but the title vested in the heir, and the jury should have been so directed, and should have been told that when John Morrisson and the widow made the division of the land it was to be presumed that he was doing only what as heir of his brother he was bound by law to do, namely, assigning the widow her right of dower in her deceased husband's land.

Held, also, that the fact that he did set off more than a third of the land was a matter of no importance, for it might be that though the widow got half of the land, it did not exceed one third of the value of it.

Doe v. Bernard, 13 Q. B. 945, followed.

A new trial was ordered.

Weldon, Q.C., for the plaintiffs.

G. F. Gregory, for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

RYAN v. WHELAN.

Tax sale—Statutes confirming—Irregularities

Land was sold in 1882 for the taxes of 1880 and 1881. No by-law levying a rate was passed in both years after the revision of the assessment roll. The statute then in force authorized a sale when two years' arrears were due. Upon the deed in pursuance of such sale being attacked:—

Held, reversing the decision of TAYLOR, C.J., (1) that the sale and deed were invalid. (2) That the Act 47 V. c. 11, s. 340,

providing that "all lands heretofore sold for school, municipal, or other taxes for which deeds have been given to purchasers, shall become absolutely vested in such purchasers . . . . unless the validity thereof has been questioned before the first day of January, 1885," and the Act 49 V. c. 52, s. 673, as amended by 50 V. c. 10, s. 52, applied only where there were over two years' taxes legally due.

Per BAIN, J.—The Act 51 V. c. 101, s. 58, which provides that "all assessments heretofore made and heretofore struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby," only extends to remedying and supplying irregularities and defects in assessments and rates that were actually made and struck in substantial conformity with the directions of the statutes.

Per KILLAM, J.—That Act having been passed after the execution of the deed could not operate to pass to the purchaser a title which previously he had not obtained.

ASHDOWN v. MANITOBA FREE PRESS CO.

Libel—Affidavit or affirmation—Authority of commissioner—Truth of contents of affirmation—Pleading—Special damages—Benefit of an Act.

50 V. c. 23 (Man.) enacted that "no person shall publish a newspaper until . . . an affidavit or affirmation . . . shall have been delivered to the prothonotary . . . " The affidavit or affirmation was to set forth truly certain particulars. Power was given to any justice of the peace or commissioner to take the affidavit or affirmation.

Held, that an affirmation was sufficient although made by a person not entitled by statute to substitute an affirmation for an affidavit.

Such an affirmation was made by the managing director of a company. In the absence of evidence as to his duties,

Held, that the affirmation was sufficient.

The affirmation was entitled "In the matter of The Manitoba Daily *Free Press* (a daily newspaper) and of chapter 23 of the Statutes of Manitoba passed in the fiftieth Victoria:

"I, W. F. L., journalist, do solemnly declare and affirm"; and concluded "And I make this solemn declaration conscien-

tiously believing the same to be true and by virtue of the Act respecting extra-judicial oaths." The commissioner's certificate was as follows: "Solemnly declared and affirmed before me at the city of Winnipeg, in the county of Selkirk, this 19th day of December, A. D. 1887. John B. McKilligan, a commissioner, etc."

The authority of the commissioner to take the affirmation was derived not from the Act respecting extra-judicial oaths, but from the Act above quoted, or from 49 V. c. 28.

Held, that the affirmation was nevertheless valid.

There was no proof that the person before whom the affirmation was taken was a commissioner.

Held, that such proof was unnecessary.

The Act 50 V. c. 22 provided that "except in cases where special damages are claimed the plaintiff in all actions for libel in newspapers shall be required to prove either actual malice or culpable negligence in the publication of the libel complained of." And the Act 50 V. c. 28 provided that "no person . . who has . . . not complied with the provisions of this Act shall be entitled to the benefit of any of the provisions" of the other Act.

Held, 1. That it was not necessary to plead compliance with c. 28 in order, upon the trial, to obtain the benefit of c. 22.

2. That "cases where special damages are claimed" means not merely claimed in the declaration, but also by evidence at the trial.

3. Allegations of loss of business are allegations of general damages only. Where special damages are claimed, the names of customers whose business has been lost must be set out.

[TAYLOR, C. J.

In re R. A., AN ATTORNEY.

Attorney—Striking off the rolls—Delay—Civil action pending.

A delay of five months is not a bar to a motion to strike off the rolls where an unsuccessful motion for an order to compel the attorney to answer has meanwhile been made.

The pendency of civil proceedings upon a cause of action arising out of the same matter is not an answer to a motion to strike off.

Nor is the fact that the matter complained off involves a criminal charge.

In re R. A., an Attorney, 6 Man. L.R. 398, commented on.

The charges being denied, a reference to inquire and report was ordered.

In re CANADIAN PACIFIC RAILWAY COMPANY.

Company—Provincial license to hold real estate.

Certain property having been brought under the Real Property Act, a certificate of title was issued to the C.P.R. Co. The company had not taken out a Provincial license, and desired to transfer a part of the property.

Held, that the question was settled when the certificate of title issued, and could not now be raised.

EDEN v. EDEN.

Costs—Answer instead of demurrer.

A bill prayed foreclosure and ejectment. The answer attacked the mortgage and claimed title in the defendants. At the hearing the defendants submitted to foreclosure, but contended that ejectment ought not, upon the frame of the bill, to be decreed, and the plaintiff did not press for it.

Held, that the plaintiff should have the costs of a simple foreclosure merely.

If a defendant answers when he might have demurred and the case goes to a hearing, no costs will be given to either party.

WESTERN CANADA L. & S. CO. v. SNOW.

Fraudulent conveyance—Abolition of fi. fa. lands—Multifariousness—Bill of one execution creditor on behalf of all others.

A judgment creditor, although entitled to priority over others, may file a bill on behalf of himself and the others to have a deed declared fraudulent against creditors.

An Act repealed the only statutory provisions under which real estate became bound by and could be sold under writs of fi. fa.

The same Act provided that writs then in the sheriff's hands "shall remain in full force, virtue, and effect, and may be renewed from time to time." During the following session another Act empowered sheriffs to sell lands under writs remaining in their hands. Between these Acts a bill was filed by an execution creditor on behalf of himself and all others to set aside a deed.

Held, that under the former Act writs remained in the sheriff's hands in full force, but awaiting further legislation to enable the sheriff to proceed; and that even prior to such further legislation the plaintiff had a sufficient *locus standi*.

GRANT v. HUNTER.

Foreign commission—Issue under Real Property Act.

The Court has no power to issue a foreign commission to take evidence upon an issue directed under the Real Property Act.

[DUBUC, J.

McGINLEY v. CANADIAN PACIFIC RAILWAY CO.

Railways—Means to alight—Negligence.

The plaintiff was a passenger on the defendants' railway. On arriving at her destination she found that there was no platform; that the descent from the lowest step of the car was twenty-six inches; and that there was no light other than that afforded by a brakeman's lantern. The brakeman assisted her by placing his hands under her arm pits, she resting her hands upon his shoulders. There was evidence that raised platforms are dangerous and not in use in many places. The plaintiff was injured in the descent.

Held, that the defendants were not guilty of negligence, and were not liable.

[KILLAM, J.

FORREST v. GILSON.

Mortgage—Conveyance of equity of redemption in discharge of debt—Pleading—Principal and surety.

To an action upon the covenant in a mortgage the defendant pleaded that he had conveyed the equity of redemption to B., who conveyed it to the mortgagee in discharge of the debt.

Held, a good equitable plea.

After the conveyance to B. there was an implied obligation in equity on his part to indemnify the mortgagor against the debt.

Quære, whether in such a case the relation of principal debtor and surety, as between the mortgagor and B., was constituted.

In re SASKATCHEWAN COAL MINING CO.

Company—Winding-up—Allowance to liquidators—Reference to Master.

The Court has no power to refer to the Master the consideration of the amount to be allowed to the liquidator.

The scale of remuneration of liquidators fixed in England will be followed here, not as absolutely binding, but as a guide.

Amount of remuneration under certain circumstances discussed.

ONTARIO BANK v. SMITH.

Married woman—Next friend—Commission—Material on application.

A married woman defendant applied for a commission. Her husband, who was also a defendant, appeared and supported the motion.

Held, that a next friend was not necessary for the purposes of the application, but the order was made as upon the application of both husband and wife.

It is not necessary upon an application for a commission to shew the nature of the evidence proposed to be given.

HORNE v. MARTIN.

Interpleader order—Rescission because of sheriff giving up possession.

An interpleader order, besides providing for an issue, required the execution creditor to give security for costs by a certain day, otherwise he should be barred; and directed the sheriff to sell unless the claimant gave security for the goods. After lapse of the prescribed period for giving security for costs the referee made an order enlarging the time. Upon appeal a Judge discharged this order, holding that the creditor had become barred and that there was no jurisdiction to extend the time. The full

Court, however, restored the referee's order. After the order of the single Judge the sheriff withdrew from possession and the goods were dissipated. The creditor thus finding it useless to proceed with the issue, moved to rescind the interpleader order.

Held, that the order should not be rescinded, but that the creditor's remedy was by action against the sheriff if he had done wrong.

[BAIN, J.

DYSART v. DRUMMOND.

Vendor and purchaser—Preparation of conveyance.

Where a vendor agrees to convey the lands to the vendee, the vendor must prepare and execute the deed.

BERTRAND v. PARKES.

Bankruptcy and insolvency—Assignee for creditors a purchaser for value—Chattel mortgages—Satisfaction of first by second—Secrecy as evidence of fraud.

A voluntary assignee in insolvency is a purchaser for value, and, if without notice, may protect himself as such against prior equities.

Notice to some of the creditors for whom the assignee holds in trust will not invalidate his plea of purchaser for value without notice.

Semble, that an agreement between chattel mortgagor and mortgagee not to register the mortgage, so that the mortgagor's credit may not be injured, is not fraudulent in itself, but may be some evidence that the whole transaction was a fraud upon creditors.

A chattel mortgage being in existence upon a stock of goods together with all goods thereafter to be added to it, a new one securing the same debt was taken, payable at a future time—having a similar description in the parcels. It was sworn that it was not the intention to cancel the old one; it was not cancelled or given up; and some interest accrued upon it was not secured by the new mortgage.

Held, that the legal effect was that the old mortgage was cancelled.

Supreme Court of Canada.

ONTARIO.] [10TH MARCH, 1890.

MEAD v. O'KEEFE.

Partnership—Terms of—Breach of conditions—Expulsion of one partner—Notice—Waiver—Goodwill.

Partnership articles for a firm of three persons provided that if any partner was guilty of breaking certain conditions of the terms of partnership, the others could compel him to retire by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of the goodwill of the business. One of the partners having broken one of such conditions, the others verbally notified him that he must leave the firm and to avoid publicity he consented to an immediate dissolution which was advertised as "a dissolution by mutual consent." After the dissolution the retiring partner made an assignment of his goodwill and interest in the business, and the assignee brought an action against the remaining partners for the value of the same.

Held, reversing the judgment of the Court below, 15 A.R. 108, FOURNIER, J., dissenting, that the action of the defendants in advertising that the dissolution was "by mutual consent" did not preclude them from showing that it took place in consequence of the misconduct of the retiring partner; that such advertisement could not be invoked to support a claim which could have been made if the dissolution had really been by mutual arrangement; that the forfeiture of the goodwill was caused by the improper conduct which led to the expulsion of the partner in fault, and not by the mode in which such expulsion was effected; and, therefore, the want of notice required by the articles of intention to expel could not be relied on as taking the retirement out of that provision of the articles by which the goodwill was forfeited.

Christopher Robinson, Q.C., and *Moss*, Q.C., for the appellants.
McCarthy, Q.C., and *Worrell*, for the respondent.

[12TH JUNE, 1890.

HISLOP v. TOWNSHIP OF McGILLIVRAY.

Municipal corporations—Duty of—Road allowance—Obligation to open—Substitution in lieu thereof—Jurisdiction of Court over municipality—C. S. U. C. c. 54.

H., was owner of and resided on a lot in the 8th concession of the township of McG., and under the provisions of C. S. U. C. c. 54 an allowance was granted by the township for a road in front of said lot. This road was, however, never opened owing to the difficulties caused by the formation of the land, and a by-law was passed authorizing a new road in substitution thereof. Some years after H. brought suit to compel the township to open the original road or, in the alternative, to provide him with access to his lot, and also to keep said road in repair and pay damages for injuries caused by the road not having been opened.

Held, affirming the judgment of the Court below, 15 A.R. 687, that the provisions of C. S. U. C. c. 54 requiring a township to maintain and keep in repair roads, etc., and prohibiting the closing or alteration of roads, only applied to roads which have been formally opened and used and not to those which a township in its discretion has considered it inadvisable to open.

Held, also, that the Courts of Ontario have no jurisdiction at the suit of a private individual to compel a municipality to open an original road allowance and make it fit for public travel.

R. M. Meredith, for the appellant.

W. R. Meredith, Q.C., for the respondent.

BRITISH CANADIAN LUMBER CO. v. GRANT.

Action for discovery—Possession of company's books—Evidence.

G. was for some time manager of the B. C. L. Company, and his services were dispensed with by written notice which directed him to hand over the books, etc., to a person named. He demanded an audit of the books, which was begun and partially finished, and while the books were, presumably, in an office formerly occupied by G. as such manager, he ejected from such office a liquidator of the company, which had become insolvent. In an action against G. to compel him to hand over the books or

make discovery as to where they were, he alleged that they were not in his possession or under his control. The trial Judge held that they had been in his possession when the liquidator was ejected from the office and that the defence was not made out. He made an order for discovery and his judgment was affirmed by the Divisional Court and the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, affirming the judgments of the Courts below, that the judgment of the trial Judge, who saw and heard the witnesses, affirmed as it was by two Courts, should not be interfered with, only matters of fact being in issue.

Hoyles, Q.C., and *Wyld*, for the appellant.

W. Cassels, Q.C., and *Lockhart Gordon*, for the respondents.

TITUS v. COLVILLE.

Solicitor—Action by—Professional services—Election petition—Evidence—Questions of fact.

T., a solicitor, brought an action for professional services rendered in the conduct of a petition against the return of a member of the Legislative Assembly of Ontario. The defendants in the action were respectively the president, secretary, and treasurer of the Liberal Conservative Association of the county returning the member whose election was protested. In his statement of claim T. alleged that at a meeting of the association at which it was determined to protest the return a resolution was passed appointing him solicitor to carry on proceedings, and that the defendants retained and employed him as such solicitor. The defence to the action was that the defendants never retained T. as alleged, but that he had volunteered to act as such in the said proceedings without any remuneration. The action was tried without a jury and the trial Judge found that there was no evidence of any resolution appointing T. solicitor, or of any retainer of T. by the defendants as solicitor in the proceedings, and he gave judgment for the defendants. A Divisional Court reversed this judgment, holding that the retainer was proved, but the Court of Appeal, in turn, reversed the judgment of the Divisional Court, and restored that of the trial Judge. On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the Court of Appeal, that the only matters in issue being matters of fact which were found in favour of the defendants by the trial Judge, who saw and heard the witnesses and was the most competent person to decide these questions, and his judgment having been affirmed by the Court of Appeal, it should not be disturbed by this Court.

F. E. Titus, for the appellant.

Northrup, for the respondents.

NEW BRUNSWICK.] [10TH MARCH, 1890.

O'BRIEN v. O'BRIEN.

Partnership—Action by partners—Set-off—Dissolution—Notice to defendant.

An action was brought by three partners in the lumbering business for the amounts due from the defendant, for whom they had been getting out lumber during the years 1880, 1881, and 1882, as appeared by the accounts made out by the defendant at the end of each year. To this action a set-off was pleaded, the greater part of which was for goods supplied after the year 1882, and the plaintiffs contended that such goods were supplied to one of them only; that the partnership had been previously dissolved and the other plaintiffs had nothing to do with the dealings connected with the set-off. The issues involved in the action were, first, whether or not the partnership had been dissolved before the goods covered by the set-off were supplied by the defendant; secondly, if it had been so dissolved, whether or not the defendant had notice of the dissolution.

On the trial the plaintiffs made a *prima facie* case by proving the accounts of the defendant at the end of each year shewing the several balances claimed in the action and after evidence was taken on the set-off the plaintiffs caused the books of the defendant to be produced to shew that the goods supplied after 1882 were charged to P. B., whereas during the previous years the charges were to P. B. & Bros., the name of the plaintiffs' firm.

To rebut this the defendant was allowed, subject to objection, to show that entries had sometimes been made during the existence of the partnership, against P. B., and the Judge in charging the jury told them that they could inspect the books and see how they were kept for both periods, and if there was any difference between the years 1880-83 and the subsequent years.

The jury found the issues in favour of the defendant, who obtained a verdict on his set-off. This was affirmed by the full Court, subject, however, to the defendant consenting to his verdict being reduced by deduction of an amount as to which the trial Judge had certified there was not satisfactory evidence, and unless the defendant consented to such reduction a new trial would be ordered. On appeal from this decision to the Supreme Court of Canada,

Held, STRONG and GWYNNE, JJ., dissenting, that there was no misdirection in the trial Judge charging the jury as he did; that the jury having on the evidence found the facts in favour of defendant, and their finding having been confirmed by the full Court, it should not be disturbed; and that substantial justice was done by the reduction of the defendant's damages.

Held, *per* GWYNNE, J., that there should be a new trial; that the evidence from the defendant's books which was objected to should not have been received; and that the course pursued at at the trial, and by the learned Judge in his charge, seemed based on the assumption that because the plaintiffs had at one time been partners, in special transactions, they should be deemed to be partners subsequently in an entirely different business, which assumption was utterly without warrant.

Held, also, *per* GWYNNE, J., that the Court had no right to compel the defendant to consent to a reduction of damages, as such a course has never been pursued except in an action for unliquidated damages where the sum awarded was considered excessive.

G. F. Gregory, for the appellant.

Gilbert, Q.C., for the respondents.

SEARS v. CITY OF ST. JOHN.

Lessor and lessee—Covenant for renewal—Option of lessor—Second term—Possession by lessee after expiration of term—Effect of—Specific performance.

A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued and it should be optional with the lessors either to pay for the same or continue the lease for a further term of like

duration. After the term expired the lessees remained in possession for some years, when a new indenture was executed which recited the provisions of the original lease and, after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby, at the same rent and *under the like covenants, conditions, and agreements* as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession and paid rent for one year, when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender, and, after demand of further rent and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease, for renewal of the second term at their option.

Held, affirming the judgment of the Court below, RITCHIE, C. J., and TASCHEREAU, J., dissenting, that the lessors were not entitled to a decree for specific performance.

Held, *per* GWYNNE, J., that the provision in the second indenture granting a renewal under the like covenants, conditions, and agreements as were contained in the original lease did not operate to incorporate in said indenture the clause for renewal in said lease which should have been expressed in an independent covenant.

Per GWYNNE, J., PATTERSON, J., *hesitante*, that, assuming the renewal clause was incorporated in the second indenture, the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could, the clause would operate to make the lease perpetual at the will of the lessors.

Per GWYNNE and PATTERSON, JJ., that the option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument containing such clause; and if the second indenture was subject to renewal the clause had no effect, as there were no buildings erected during the second term.

Per GWYNNE, J., that the renewal clause was inoperative under the Statute of Frauds, which makes leases for three years and upwards, not in writing, to have the effect of estates at will only,

and consequently there could be no second term of fourteen years granted except by a second lease executed and signed by the lessors.

Per RITCHIE, C.J., and TASCHEREAU, J., that the occupation by the lessees after the term expired must be held to have been under the lease, and to signify an intention on the part of the lessees to accept a renewal for a further time as the lease provided.

Gilbert, Q.C., and *Sturdee*, for the appellant.

I. Allen Jack, for the respondent.

WOOD v. VAUGHAN.

Dog—Injury committed by—Ownership—Scienter—Evidence for jury.

W. brought an action for injuries to her daughter committed by a dog owned or harboured by the defendant V. The defence was that V. did not own the dog and had no knowledge that he was vicious. On the trial it was shown that the dog was formerly owned by a man in V.'s employ, who lived and kept the dog at V.'s house. When this man went away from the place he left the dog behind with V.'s son to be kept until sent for, and afterwards the dog lived at the house, going every day to V.'s place of business with him or his son, who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one and his son at the other. V. swore that he knew nothing about the dog being left by the owner with his son until he heard it at the trial. The trial Judge ordered a non-suit, which was set aside by the full Court and a new trial ordered.

Held, affirming the judgment of the Court below, that there was ample evidence for the jury that V. harboured the dog with knowledge of its vicious propensities, and the non-suit was rightly set aside.

Weldon, Q.C., for the appellant.

Alward, for the respondent.

[12TH JUNE, 1890.

FERGUSON v. TROOP.

Lessor and lessee—Eviction—Entry by lessor to repair—Intent—Suspension of rent—Construction of lease.

A lease of business premises provided that the lessor could enter upon the premises for the purpose of making certain repairs and alterations at any time within two months after the beginning of the term but not after except with the consent of the lessee. An action for rent under the lease was resisted on the ground that the lessor had been in possession of part of the premises after the specified time without the necessary consent, whereby the tenant had been deprived of the beneficial use of the property, and had been evicted therefrom. On the trial the jury found that no consent had been given by the lessee for such occupation and that the lessee had no beneficial use of the premises while it lasted.

Held, per TASCHEREAU, GWYNNE, and PATTERSON, JJ., reversing the judgment of the Court below, that the evidence did not justify the finding of no assent; that an express consent was not required, but it could be inferred from the conduct of the tenant; and there being no limitation of time for the completion of the repairs, the limitation being confined to the entry, and there being evidence that the lessee acquiesced in the occupation by the lessor after the time limited, the plea of eviction was not proved.

Held, per RITCHIE, C.J., and STRONG, J., approving the judgment of the Court below, that the jury having negatived any consent by the lessee, and having found that the interference with the enjoyment by the tenant of the premises was of a grave and permanent character, the rent was suspended in consequence thereof.

Held, per PATTERSON, J., that interference by a landlord with his tenant's enjoyment of demised premises, even to the extent of depriving the tenant of the use of a portion, does not necessarily work an eviction; a tenant may be deprived of the beneficial occupation of the premises for part of his term, by an act of the landlord which is wrongful as against him, but unless the act was done with the intention of producing that result, it would not work an eviction.

Gilbert, Q.C., for the appellant.

Weldon, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[28TH JUNE, 1890.

ANDERSON v. CANADIAN PACIFIC R. W. CO.

Railways—Destruction of luggage—Act of God—Limitation of action—R. S. C. c. 109, s. 27.

This was an appeal by the defendants from the judgment of the Common Pleas Division, 17 O. R. 747, heard before this Court on the 15th May, 1890.

Robinson, Q.C., and *G. T. Blackstock*, for the appellants.

W. Nesbitt and *A. W. Aytoun Finlay*, for the respondent.

The appeal was limited to two grounds: (1) that the accident was caused by the act of God or vis major; (2) that the defendants were protected by the limitation clause, R. S. C. c. 109, s. 27, the accident having taken place more than six months before action.

The Court dismissed the appeal with costs.

As to the first point the Court agreed with the Court below and thought that the finding of the jury was fully justified by the evidence. Upon the second point the appellants also failed, BURTON and MACLENNAN, JJ.A., adhering to the opinion expressed by them in *McArthur* v. *Northern and Pacific Junction R. W. Co.*, 17 A. R. 86, that the section was *ultra vires*, and HAGARTY, C.J.O., and OSLER, J.A., thinking that it did not apply to an action of contract, though not fully discussing the question, as such discussion was unnecessary.

[MACLENNAN, J.A., 8TH SEPTEMBER, 1890.

FOSTER v. EMORY.

Division Court Appeal—Judgment for $100—Subsequent interest—R. S. O. c. 51, s. 148.

The "sum in dispute" upon an appeal from a Division Court, under R. S. O. c. 51, s. 148, is the sum for which judgment has been given in the Division Court.

Where judgment was given for $100,

Held, that subsequently accrued interest did not make the sum in dispute exceed $100.

A. C. Galt, for the appellant.

Middleton, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 27TH JUNE, 1890.

BRIGGS v. SEMMENS.

Easement—Severance of tenement by devise—Reasonable enjoyment of parts devised—Necessary rights of way.

Upon the severance of a tenement by devise into separate parts, not only do rights of way of strict necessity pass, but also rights of way necessary for the reasonable enjoyment of the parts devised, and which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts.

Moss, Q.C., and *Lynch-Staunton*, for the plaintiff.

J. W. Nesbitt and *M. Malone*, for the defendant McDonough.

McBrayne, for the defendants the Semmens.

BLACK v. ONTARIO WHEEL CO.

Master and servant—Accident to servant—Fall of elevator—Negligence—Master's knowlege of defects—Want of reasonable care—Common law liability—Workmen's Compensation for Injuries Act—Factories Act.

In an action by a workman against his employers to recover damages for injuries sustained owing to the falling of the cage of an elevator in the defendants' factory, the negligence charged was in the manner in which the heads of the bolts were held and in the nature of the safety catch used upon the cage.

There was no evidence to shew that the defendants were or should have been aware that the bolts were improperly sustained. They had employed a competent contractor to do this work for them only a few weeks before, and it was not shewn that the alleged defect might readily have been discovered.

Held, that the defendants were not liable upon this head.

Murphy v. Phillips, 35 L. T. N. S. 477, distinguished.

The safety catch was made for the defendants by competent persons, and there was no evidence that it was not one which was ordinarily used.

Held, that the defendants were not liable upon this head unless there was a want of reasonable care on their part in using the appliance which they used; and it was no evidence of such want of reasonable care merely to shew that a safety catch of a different pattern was in use ten years ago by others, or even that it was at present in use, and that a witness thought it might have prevented the accident; and, as no negligence was shewn, the defendants were not liable either at common law or under the Workmen's Compensation for Injuries Act.

By s. 15, s-s. 4, of the Factories Act, R. S. O. c. 208, "All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by the inspector, whereby the cab or car will be securely held in the event of accident," &c.

There was no evidence to shew whether this particular safety catch had been approved by the inspector.

Held, that the onus was upon the plaintiff to prove that the catch had not been approved; and if it had neither been approved nor disapproved, the question still was whether the catch

used was of such a character and pattern as to make the use of it unreasonable.

Britton, Q.C., for the plaintiff.

E. D. Armour, Q.C., for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 4TH SEPTEMBER, 1890.

FINLAY v. MISCAMPBELL.

Master and servant—Workmen's Compensation for Injuries Act—Factories Act.

The plaintiff was employed by a sub-contractor to work upon lumber after it had left the defendants' saw-mill and before it was shipped. The sub-contractor supplied water for the use of his men. The plaintiff, however, to get some fresher water to drink, went through the saw-mill (in which he had no business in connection with his work) and in returning, going out of his way through the mill, to assist a workman who was in difficulty with some planks, he fell into a hole in which a saw was working, and got injured.

Held, that, under these circumstances, the plaintiff could have no claim against the defendants either under the Ontario Factories Act, R. S. O. c. 208, or the Workmen's Compensation for Injuries Act, R. S. O. c. 141.

Laidlaw, Q.C., and *W. F. Kerr*, for the plaintiff.

McCarthy, Q.C., and *H. S. Osler*, for the defendants.

[BOYD, C., 6TH JUNE, 1890.

STOTHART v. HILLIARD.

Easement—Prescriptive rights—Dominant and servient tenements—Rectory lands—Lease of servient tenement—Unity of possession—Suspension of easement—Joint owners of mill dam—Injunction—Damages.

In an action, begun in 1889, for an injunction to restrain two joint owners of a mill dam, having mill properties respectively on the east and west sides of a river, from damming back water

against the plaintiff's land, and for damages, the defendants asserted an easement gained by prescription under R. S. O. c. 111, through user since 1838 and 1842. The plaintiff's land was patented in 1836 as glebe land appurtenant to a rectory, and the title vested in the rector and his successors as a corporation sole. In 1868 an Act was passed empowering the fee simple of this rectory land to be sold. The mill-owner on the west side of the river was in possession as lessee from 1866 till 1887 of the glebe land, which the plaintiff purchased in 1875, but did not get possession of till 1887.

Held, that no prescriptive right in the defendants to an easement over the plaintiff's land could have arisen prior to 1868, because the rector could not have alienated the fee, and an actual grant of the easemont in perpetuity or in fee would have been invalid.

2. That the mill-owner on the west side had gained no prescriptive right since 1868, because between 1866 and 1887 there was such unity of possession in both dominant and servient tenements as caused a suspension of the easement.

3. That the mill-owner on the east side was not affected by the lease of the servient tenement, his user having been begun adversely, and the easement having been enjoyed by him as of right continuously and uninterruptedly for twenty years before action.

4. That the defendants being joint owners of the dam, the defendant on the east side was entitled to the supply of water as furnished by the existing dam all the way across the river, and therefore the plaintiff's remedy against the defendant on the west side was not an injunction, but damages.

Moss, Q.C., and *R. E. Wood*, for the plaintiff.

D. W. Dumble and *C. J. Leonard*, for the defendant Hilliard.

Wallace Nesbitt and *R. M. Dennistoun*, for the defendants the Auburn Woollen Company.

[24TH SEPTEMBER, 1890.

In re MANUFACTURERS' LIFE INS. CO. AND McLEAN.

Dower—Form of bar—Short Forms Act—Variation from—Municipal taxes—Incumbrance.

Petition under the Vendor and Purchaser Act by James McLean, a purchaser of certain land in the city of Toronto from the Manufacturers' Life Insurance Company.

The petition set out that by the agreement for sale and purchase made on the 9th August, 1890, the petitioner agreed to buy and the company to sell the land "free from incumbrances." In the chain of title of the company was a conveyance dated 21st May, 1880, made in pursuance of the Act respecting Short Forms of Conveyances between F.C.D., the grantor, of the first part, J.A.D., his wife, of the second part, and W.F., the grantee, of the third part. The deed was duly executed by the grantor and by J.A.D. In the deed was the following clause: "And the said party of the second part hereby bars her dower in the said lands."

On the 7th July, 1890, the corporation of the city of Toronto passed a by-law fixing the rate of taxation of real estate within the city for the year 1890, and declaring that the taxes should be payable from and after the 7th July, 1890. The petitioner took the position that he was entitled to have the whole of the taxes for the current year charged upon the lands, paid by the company, as being an incumbrance on the lands, but the company declined and refused to pay the same, excepting an amount thereof proportioned to so much of the current year as should have elapsed up to the date of completing the purchase.

The petition prayed for a declaration whether the dower clause in the deed referred to was sufficient to operate as a grant and release of the dower or right to dower expectant of J.A.D.; and for a declaration whether the company were liable under the contract to pay the whole of the taxes for the current year.

The petition came on for argument before Boyd, C., in Court on 24th September, 1890.

R. S. Cassels, for the purchaser. The short form of bar of dower in R.S.O. c. 102 is "And the said (A.B.) wife of the said (grantor) hereby bars her dower in the said lands." I contend that the substitution of the words "the said party of the second part" for the words "the said A.B., wife of the said (grantor)" is such a variation as renders the clause inoperative as a bar of dower. The Act requires the name to be given and the fact to be stated that the person named is the wife of the grantor. The fact that certain exceptions and variations are allowed by the Act shews that no other variations are permissible.

As to the apportionment of taxes, I refer to *Goldie* v. *Johns*, 16 A.R. 129; *Chamberlain* v. *Turner*, 31 C.P. 460; *Bank of Montreal* v. *Fox*, 6 P.R. 217; *Harrison* v. *Joseph*, 8 P.R. 293.

T. P. Galt, for the vendors, was not called on.

BOYD, C.—I do not think the variation from the short form is material; there is perfect certainty as to the person intended; indeed the words of the statute "wife of the said (grantor)" may be said to be incorporated by reference, for "the said party of the second part" is described in the earlier part of the deed, as the wife of the party of the first part.

As to the taxes, they are an incumbrance only to the date of the purchase, and a proportionate part only is payable by the vendors. I cannot interfere to disturb a practice of long standing that the taxes are apportionable between the vendor and purchaser according to the date of the sale. There was a decision by Mr. Justice Draper in 1853, *Haynes* v. *Smith*, 11 U.C.R. 57.

[ROBERTSON, J., 11TH AUGUST, 1890.

In re GING.

Building societies—R. S. O. c. 169, s. 47—"Obligation"—Moneys deposited upon savings bank account—Reasonable doubts—Petition—Costs.

A person died in the United States of America having moneys to his credit deposited upon savings bank account with two building societies doing business in Ontario, incorporated under R. S. O. c. 169. An administrator appointed by a Court in the foreign country applied to the building society to have the moneys transferred to him, but the societies entertained doubts whether the words of s. 47 of R. S. O. c. 169 "share, bond, debenture, or obligation" applied to a savings bank account, and petitioned the Court under s. 49.

Held, that the word "obligation" covered the liability of the petitioners to repay the amounts deposited with them.

Held, also, that the doubts of the petitioners were reasonable, and they were entitled to costs.

Gibbons, Q.C., for the petitioners.

[MacMahon, J., 21st July, 1890.

TOWN OF MEAFORD v. LANG.

Principal and surety—Misconduct of principal—Non-disclosure by creditor—Official bond—Release of surety.

In an action brought against sureties to a tax collector's bond for the due payment over of taxes collected in 1886 and 1887, it appeared that the plaintiffs, though they knew that the collector had for some years had a loose way of doing his business, and was dilatory in making his returns, yet had not had it brought home to them that he was actually dishonest; and that they had not informed the defendants, when obtaining the execution of the bond by the latter, of their causes of complaint against the collector; but it did not appear that they had dealt fraudulently with the defendants.

Held, that the non-disclosure by the plaintiffs to the defendants of the past conduct of the collector did not relieve the defendants from their obligation under the bond.

W. Cassels, Q.C., for the plaintiffs.

J. K. Kerr, Q.C., for the defendants.

IN CHAMBERS.

[Boyd, C., 16th September, 1890.

BROWN v. HOSE.

Costs—Scale of—Rule 1174—"Order as to the costs"—Jurisdiction of taxing officer—Action for goods sold and delivered—Ascertainment of amount—Pleadings—County Court jurisdiction.

Where in an action in the High Court an order was made by a local Judge upon consent allowing the plaintiffs to sign judgment for $233, with costs of suit to be taxed:—

Held, that full costs were not implied unless it was a case for suing in the High Court; and the jurisdiction of the taxing officer to decide as to the scale of costs was not ousted.

History of rule 1174.

The claim was $233, the price of furniture sold by the plaintiffs to the defendant, according to prices indorsed on the writ,

and duly delivered. By his statement of defence the defendant admitted $160.50, which he paid into Court. As to the balance, he pleaded that it was not payable because the goods ordered in respect thereof were not supplied or delivered, and that there was no agreement therefor within the Statute of Frauds.

Held, that the pleadings only must be looked at to ascertain what was in dispute; that the cause of action was one and indivisible; and that the *whole* cause of action was not for an ascertained amount within County Court competence.

Aylesworth, Q.C., for the plaintiff.

W. H. Blake, for the defendant.

[ARMOUR, C.J., 26TH JUNE, 1890.

OUTWATER v. MULLETT.

Costs of the day—Postponement of trial—Counsel fees.

When the action came on trial a postponement was applied for by the defendant and was ordered upon payment of the costs of the day.

Held, that counsel fees were chargeable and taxable according to the discretion of the taxing officer and not according to any arbitrary limit.

Hogg v. *Crabbe*, 12 P. R. 14, dissented from.

D. Armour, for the plaintiff.

C. J. Holman, for the defendant.

[MACMAHON, J., 17TH SEPTEMBER, 1890.

HESPELER v. CAMPBELL.

Time—Notice of appeal—Long vacation—Rule 484—R. S. O. c. 44, s. 71—Extending time—Rule 485.

Upon the true construction of Rule 484 the period of long vacation is not to be reckoned in the time allowed by s. 71 of the Judicature Act for filing and serving notice of appeal to the Court of Appeal.

Semble, also, that under the circumstances of this case, if the notice had been late, the time would have been extended under Rule 485.

Bain, Q.C., for the plaintiff.

Walter Barwick, for the defendants.

[THE MASTER IN CHAMBERS, 12TH SEPTEMBER, 1890.

HOLLISTER v. ANNABLE.

Discovery—Seduction—Examination of plaintiff's daughter.

The plaintiff in an action of seduction was examined for discovery by the defendant, but was able to give very little information.

Held, nevertheless, that the defendant was not entitled to examine the plaintiff's daughter.

The defendant having made an affidavit denying the seduction and all knowledge of it, an order was made for particulars of specific acts.

Turner v. *Kyle*, 2 C. L. T. 598; 18 C. L. J. 402, explained.

W. H. Blake, for the plaintiff.

A. H. Marsh, Q.C., for the defendant.

[23RD SEPTEMBER, 1890.

DAWSON v. ROGAN.

Discovery—Particulars—Slander.

An action for slander.

On the 27th May, 1890, an order was made requiring the plaintiff within three days after the defendant's examination for discovery to deliver to the defendant particulars of the circumstances under which, the date or dates and place or places at which, and the names of the person or persons to whom, the alleged slanderous words complained of in the plaintiff's statement of claim were claimed by the plaintiff to have been uttered by the defendant.

Under this order the following particulars were delivered:

"The circumstances under which the defendant's words complained of were spoken were occasions on which she met the various persons hereinafter named, and the times when spoken were on various dates through the year 1889 and the commencement of 1890, and they were spoken to among others [giving a number of names], and other persons whose names the plaintiff has not yet discovered and they were spoken in various places in the town of Oshawa."

The defendant moved for an order for further and better particulars and limiting the evidence to be adduced by the plaintiff at the trial to the particulars to be furnished. The plaintiff filed an affidavit stating that she could give no better particulars at present.

The motion was argued before the Master in Chambers on the 20th September, 1890.

A. H. Marsh, Q.C., for the defendant.

Charles Millar, for the plaintiff.

The following cases were referred to:—*Bradbury v. Cooper*, 12 Q. B. D. 94; *Roselle v. Buchanan*, 16 Q. B. D. 656; *Marriott v. Chamberlain*, 17 Q. B. D. 154; *Thompson v. Purkley*, 31 W. R. 230; *Gourand v. Fitzgerald*, 37 W. R. 55; *Thornton v. Capstock*, 9 P. R. 585; *Gould v. Beattie*, 11 P. R. 329; *Niagara Falls Park Commissioners v. Howard*, 18 P. R. 14; *McMillan v. Colwell*, 7 C. L. T. Occ. N. 141.

Judgment was delivered on the 23rd September, 1890.

THE MASTER IN CHAMBERS—I think the affidavit of the plaintiff shews that the case has now gone as far as any case warrants which compels particulars. The plaintiff has given the names and residences of all the witnesses, and I do not think she is to be compelled to search up these other witnesses she speaks of, who she swears she does not know the names of. She does state all her present knowledge of them. The costs I think should be in the cause.

[THE MASTER-IN-ORDINARY, 2ND JUNE, 1890.

WANZER v. WOODS.

Domicil—Residence within Ontario—Rule 271 (c).

The action was brought by a foreign company, upon a contract made in a foreign country, against two defendants, one of

whom resided in Manitoba and was there served with process. Upon a motion by this defendant to set aside the service it was contended by the plaintiffs that the defendant was ordinarily resident or domiciled in Ontario, within the meaning of Rule 271 (c.), and therefore that the Court had jurisdiction.

It appeared that at the time of the motion the latter defendant was an employee of the Government of the Province of Quebec; that prior to 1883 his domicil was Quebec, whence he removed to Manitoba, where he resided until 1886; that he then went to Australia; that in 1887 or 1888 he returned to Canada, and resided part of the time in Toronto and part of the time in Winnipeg until September, 1889, when he returned to Quebec; that he remained while in Toronto for only three months at a time; that his wife had recently gone to Europe and did not intend to return to Toronto; that his family were still in Toronto, but his intention was to keep them there only until he got something to do; that Toronto was never looked upon as a permanent home for the family; and that it was the intention of the family to go to him as soon as he should send for them.

Held, that he was neither domiciled nor ordinarily resident within Ontario; and the service was set aside.

W. M. Dowglas, for the plaintiffs.

H. E. Ridley, for the defendant J. H. Woods.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[MACLENNAN, J. A., 30TH SEPTEMBER, 1890.

ELLIOTT v. BUSSELL.

Time—Giving security on appeal—Long vacation—Rule 484 -R. S. O. c. 44, s. 71.

Motion by the plaintiff to set aside the security given by the defendant upon appeal to this Court, and to quash the appeal, on the ground that the security was not given in time.

The judgment appealed against was given on the 14th May, 1890, and the security not till the 25th September, 1890.

Kilmer, for the plaintiff, contended that the period of long vacation was to be reckoned in the three months allowed by s. 71 of the Judicature Act, R. S. O. c. 44, for giving security, and cited Holmested and Langton's Jud. Act and Rules p. 80, notes to s. 71, where it is said that "the present Rule 484 seems only to provide for cases where time is limited by the *Rules*."

C. W. Kerr, for the defendants, contra, argued that under Rule 484 the time of long vacation was not to be reckoned; citing *Hespeler* v. *Campbell*, ante p. 299.

MACLENNAN, J.A., held that the period of long vacation was not to be reckoned, and that the security was therefore given in time.

Motion dismissed with costs to the defendant in the appeal, in any event.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Justices in Banc, 27th June, 1890.

REGINA *v.* MENARY.

Justices of the peace—Summary conviction—Liquor License Act, R. S. O. c. 194—Offence against s. 49—Arrest in lieu of summons—Remand by one justice only—Powers of justices under s. 70—Distress warrant—Imprisonment upon non-payment of fine and costs—Admission of no distress—Costs of conveying to gaol—Power to amend conviction—Evidence—Saving clause, s. 105.

The defendant was convicted before two justices of the peace of selling liquor without a license, contrary to s. 49 of the Liquor License Act, R.S.O. c. 194. A conviction was drawn up and filed with the clerk of the peace in which it was adjudged that the defendant should pay a fine and costs, and if they were not paid forthwith, then, inasmuch as it had been made to appear on the admission of the defendant that he had no goods whereon to levy the sums imposed by distress, that he should be imprisoned for three months unless these sums and the costs and charges of conveying him to gaol should be sooner paid. An amended conviction was afterwards drawn up and filed, from which the parts relating to distress and the costs of conveying to gaol were omitted. A warrant of commitment directed the goaler to receive the defendant and imprison him for three months unless the said several sums and the costs of conveying him to gaol should be sooner paid.

Upon a motion to quash the convictions and warrant :—

Held, that the mode adopted for bringing the defendant before the justices was not a ground for quashing the conviction ; and *semble*, also, that it was not improper to arrest him instead of merely summoning him.

Held, also, that the fact that the defendant was remanded by only one justice could not affect the conviction.

Semble, that the justices had no power under R.S.O. c. 194, s. 70, to issue a distress warrant or to make the imprisonment imposed dependent upon the payment of the fine and costs ; but as this objection was not taken by the defendant, no effect was given to it.

Held, also, that the justices had the right to draw up and return an amended conviction in a proper case.

Held, also, that if the justices were bound to issue a distress warrant, the insertion of the words relating to the admission of the defendant that he had no goods, was proper; and if they had no power to issue a distress warrant, these words were mere surplusage and did not vitiate the conviction.

Held, also, that if the justices had no power to require the costs of conveying him to gaol to be paid by the defendant, the conviction was amendable, as and when it was amended; for the amendment was not of the adjudication of punishment.

Held, lastly, that having regard to s. 105 of R.S.O. c. 194, and to the evidence before the justices, the convictions and warrant should not be quashed.

Allan Cassels, for the defendant.

Langton, for the complainant.

[THE DIVISIONAL COURT.

EDMONDS v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgagor and mortgagee—Application of insurance moneys—Acceleration clause in mortgage—Election not to claim whole principal—R.S.O. c. 102, s. 4, s-s. 2—Interest, time of commencement—Mortgage account—Rectification of mortgage—Laches—Agreement—Local agent and appraiser, powers of—Wrongful sale under power in mortgage—Illegal distress—Measure of damages.

Upon a motion for an interim injunction the defendants filed an affidavit and statement shewing that they had applied insurance moneys received by them, in respect of loss by fire of buildings upon land mortgaged to them by the plaintiffs, upon overdue instalments of principal, and an insurance premium paid by them; and in their statement of defence they also stated their position in a way inconsistent with that which they afterwards took, viz., that the insurance money was applicable upon the whole principal, which, by virtue of an acceleration clause in the mortgage, had become due.

Held, that the defendants had made their election, so far as the effect of the default and the application of the insurance

money was concerned, not to claim the whole principal as having become due by reason of the default; and that being so, that they must apply the insurance money, as required by R. S. O. c. 102, s. 4, s-s. 2, upon arrears of principal and interest.

Corham v. *Kingston*, 17 O. R. 432, approved and followed.

Interest can be claimed by mortgagees only from the time the money is actually paid out by them.

Method of taking a mortgage account shewn.

Rectification of the mortgage deed as to the time of the first payment of principal was refused where it was sought by the mortgagors at a time when the payment in any event was long past due, and the mortgagees, without fraud, had acted upon the mortgage as executed, and without notice of the intention of the mortgagors to have the payment fixed for a later period; and where also there was really no agreement upon which to found the rectification, the defendants' local appraiser and agent to receive applications having no express or implied authority to make such agreements.

For wrongful proceedings under power of sale in a mortgage, illegal distress upon chattels, and consequent wrongs:—

Held, that the plaintiffs were entitled to recover more than their mere money loss.

P. C. Macnee, for the plaintiffs.

Crerar, Q.C., for the defendants.

CHANCERY DIVISION.

[BOYD, C., 30TH SEPTEMBER, 1890.

BEATTY v. BEATTY.

Will—Construction—Gift to child who predeceased testator—Gift to class—Lapse.

Motion for judgment on the pleadings in an action for the construction of the will of the late William Beatty, of Toronto, carpet merchant, who died on the 2nd February, 1890, leaving a will dated 30th September, 1876, in these words:

First, I hereby constitute and appoint my wife, Margretta Beatty, and Warren Kennedy, of this city, to be my executors of this my will, directing my said executors to pay all my just debts and legacies hereinafter given out of my real and personal estate. Second, after the payment of my said debts I give to my wife and the following named children, Wm. T. Beatty, Percy Beatty, and any others that may be born to me share and share alike (excepting two thousand dollars that my wife shall have extra to use on any member of my family as her good sense and conscience may dictate), my house and furniture in this city to be my wife's (at a valuation) as long as she lives and at her death to be divided amongst her children equal, born to me, my house in Omemee to be Wm. T. Beatty's at a valuation; each of the houses are to be part of their shares, the above named children as they come of age are to have their shares.

Wm. T. Beatty predeceased his father.

Lash, Q.C., for the plaintiffs, the executors, contended that the gift to Wm. T. Beatty was *nominatim* and lapsed.

J. Hoskin, Q.C., for the infant defendant, contended that there was no lapse, but the gift went to a class.

W. H. Blake, for the adult defendant.

Boyd, C.—I have looked at the cases cited and others, and cannot say that the law is in a very clear state as to the question of lapse or no lapse arising on this will. There are expressions in *Drakeford* v. *Drakeford*, 33 Beav. 328, which would favour contradictory views, and the decision itself seems opposed to *Porter* v. *Fox*, 6 Sim. 485. *Re Allan*, 29 W.R. 430, is discussed in *Re Featherstone's Trusts*, 22 Ch. D. 120, but no definite conclusion is reached as to the preferable rule. None of the cases is precisely like this, which concerns the share of one of the children of the testator who predeceased him. The difficulties in the cases would have to be confronted if the share to the wife had been in question; but as it is, I think the better opinion is against a lapse. I therefore declare the share intended for William T. Beatty does not fail, but goes among the wife and the other children, *i.e.*, Percy and the one born after the testator's death. Costs will be out of the estate of the matter of construction.

[FERGUSON, J., 4TH SEPTEMBER, 1890.

ATTORNEY-GENERAL FOR CANADA v. CITY OF TORONTO.

Municipal corporations—By-law as to payment of water rates—Discount to consumers—Exception as to government institutions—Taxes—Discrimination.

A by-law of the defendants relating to the payment of rates for water supplied by the defendants to buildings in the municipality provided that the rates should be subject to a reduction of fifty per cent. if paid within a certain time "save and except in the cases of government and other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply."

Held, that the post-office, customs-house, and other buildings vested in the Crown, all of which were exempt from city taxes, were "government institutions" within the meaning of the by-law.

2. Having regard to 35 V. c. 79, s. 12; 41 V. c. 41, s. 3; R.S.O. c. 192, s. 19, 28, that the moneys charged and paid as water rates or rent for water were not taxes, but the price or prices paid for water upon a sale thereof to the consumers.

3. That the by-law was not invalid as discriminating against the Crown.

James Reeve, Q.C., and *Wickham*, for the plaintiff.

C. R. W. Biggar, Q.C., for the defendants.

[FALCONBRIDGE, J., 19TH AUGUST, 1890.

BAIN v. ÆTNA LIFE INSURANCE CO.

Insurance—Life—Endowment participating plan—Right of insured to profits—Divisible surplus—Discretion of actuary and directors—Statements of company in letters and pamphlets.

The plaintiff insured with the defendants upon their endowment participating plan, and by the contract of insurance the defendants agreed to pay him at the end of a specified period, if he survived, a certain sum, together with his share of the profits made in that branch of the business during the period.

The plaintiff, being dissatisfied with the share alloted to him, claimed an account and payment of his share of all the profits.

The defendants claimed the right to hold a portion of their apparent surplus to ensure the future stability of the company.

Held, that the plaintiff was bound to acquiesce in the discretion of the actuary and the directors of the company, *bona fide* exercised, and to take his share of what was apportioned as divisible surplus; and that being so, that his case was not advanced by statements made by officers of the company in letters or pamphlets as to the course pursued by them in dividing the surplus.

Laidlaw, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *J. J. Maclaren*, Q.C., for the defendants.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 27TH JUNE, 1890.

REGINA v. SMITH.

Criminal law—Separate indictments for abduction and seduction of female under sixteen—Separate offences.

The prisoner was convicted under s. 44 of R. S. C. c. 162, the Act relating to offences against the person, for unlawfully taking an unmarried girl under the age of sixteen years out of the possession of her father against his will; and on the same day was again tried and convicted under s. 8 of R. S. C. c. 157, the Act relating to offences against public morals, for the seduction of the same girl, being previously of chaste character, and between the ages of twelve and sixteen.

Held, that the offences were several and distinct, and so a conviction on the first indictment did not preclude a conviction on the second.

Dymond, for the Crown.

No one for the prisoner.

REGINA v. WATSON.

Municipal corporations—By-law respecting plumbing—Public Health Act, R.S.O. c. 205—"Owner or agent," meaning of—Plumber.

By the 6th clause of a by-law of the city of Toronto, passed under the Public Health Act, R.S.O. c. 205, it was provided that before proceeding to construct, reconstruct, or alter any portion of the drainage, ventilation, or water-system of a dwelling house,

&c., "the owner or his agent constructing the same" should file in the office of the city engineer an application for a permit therefor, which should be accompanied with a plan or specification thereof; and by the 8th clause, that after approval of such plan or specification no alteration or deviation therefrom would be allowed except on the application of the "owner or of the agent of the owner" to the city engineer.

By s. 2 of the Public Health Act "owner" is defined as meaning "the person for the time being receiving the rents of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee of any other person, or who would so receive the same if such lands and premises were let."

Held, that the agent intended by the Act and coming within the terms of the by-law meant a person acting for the owner as trustee or in some such capacity, and did not include a plumber employed by the owner to reconstruct the plumbing in his dwelling-house.

T. W. Howard, for the defendant.

H. M. Mowat, for the prosecutors.

REGINA v. DOWSLEY.

Summary conviction—Municipal by-law—Transient traders—R.S.O. c. 184, s. 239, non-compliance with—Proof of by-law.

The defendant was summarily convicted, under a municipal by-law respecting transient traders, for selling goods without a license. Upon the trial a paper stated by the solicitor of the complainant to be the original by-law was put in, instead of a copy of the by-law certified by the clerk to be a true copy, and under the corporate seal, as required by R.S.O. c. 184, s. 289.

Held, that the requirements of s. 289 not having been complied with, the conviction was invalid and must be quashed.

Aylesworth, Q.C., for the defendant.

Marsh, Q.C., for the prosecutor.

REGINA v. ATKINSON.

Police magistrate—Appointment of—Legality—County and town—Canada Temperance Act—Summary conviction.

On the 24th June, 1879, F. was appointed police magistrate for the town of W., in the county of O.; and on the 12th January, 1887, H. was appointed police magistrate for the county of O., in the room of one P., deceased. It did not appear whether F. or P. was the first appointee. The defendant was convicted by H. for an offence against the second part of the Canada Temperance Act, committed outside of the town of W.

Held, that under R.S.O. c. 72, ss. 8, 11, 12, H.'s appointment was legal; and the conviction made by him was sustained.

Regina v. *Atkinson*, 15 O. R. 110, commented on.

DuVernet, for the defendant.

Delamere, Q.C., for the prosecutor.

REGINA v. LYNCH.

Justices of the peace—Absence of police magistrate—Jurisdiction to try offence under R. S. C. c. 157—Summary conviction—Alternative punishment—Imprisonment for more than three months—Distress—R.S.C. c. 178, s. 62.

By s-s. 2 of s. 8 of R.S.C. c. 157, any loose, idle, or disorderly person or vagrant shall, upon summary conviction before two justices of the peace, be deemed gulity of a misdemeanor, and liable to a fine not exceeding $50, or to imprisonment not exceeding six months, or to both. By s. 62 of R. S. C. c. 178, the justices are authorized to issue a distress warrant for enforcing payment of a fine, and if under s. 65 a warrant is issued to detain the defendant in custody until its return, and, if the return is "no sufficient distress," then under s. 67 to imprison for three months.

B. and F., two justices of the peace for the city of Toronto, in the absence of the police magistrate for the city, convicted the defendant for vagrancy under c. 157, and imposed a fine of $50, and in default of payment forthwith directed imprisonment for six months unless the fine should be sooner paid.

Held, that under s-s. 2 of s. 8 of c. 157 the justices had jurisdiction to adjudicate in the matter; and it was unnecessary to consider the effect of an agreement entered into between the police

magistrate and B. whereby the latter was to assist in the trial of offences at the police magistrate's Court and to receive a salary for so doing.

Held, however, that the conviction was bad and must be quashed; for under c. 157 there was no power to award imprisonment as an alternative remedy for non-payment of the fine; while under c. 178 imprisonment can be awarded only after a distress has been directed and after default therein, and furthermore the imprisonment can be for only three months.

DuVernet, for the defendant.

Dymond and *J. W. Curry*, for the Crown and magistrates.

[THE DIVISIONAL COURT.

BAKER v. FISHER.

Sale of goods—Intention of purchaser to set off claim against vendor—Concealment at time of sale—Fraud.

The plaintiff, with the intention of parting with the possession and property in certain flour, made an absolute sale of it to the defendant upon a short term of credit. The defendant withheld from the plaintiff his intention to pay for the flour by setting off a claim he had acquired against the plaintiff.

Held, that this did not constitute a fraud on the defendant's part so as to entitle the plaintiff to disaffirm the contract and replevy the flour.

Smythe, Q.C., for the plaintiff.

Machar, for the defendant.

HOWARD v. CITY OF ST. THOMAS.

Municipal corporations—House being moved coming in contact with telephone wire across street—Bricks thrown down and passer by injured—Liability.

O. was moving a house, 25 feet high, along one of the streets in the city of St. T., having obtained the authority of the city engineer to do so, when, by reason of its coming in contact with a wire—the existence of which O. was fully aware of—stretched by a telephone company, without any authority from the city, across the street, the wire being 19½ feet from the ground, though the company's act of incorporation required it to be at

least 22 feet, the wire was torn from its fastenings, loosening some bricks which fell on the plaintiff, severely injuring him.

In an action against the city corporation, the telephone company, and O. :—

Held, that no liability attached either on the city or the telephone company; and that O. was alone liable for the damage sustained by the plaintiff.

G. T. Blackstock and *Crothers*, for the plaintiff.

Ermatinger, Q.C., for the defendants the city of St. Thomas.

C. Macdougall, Q.C., and *S. G. Wood*, for the defendants the Bell Telephone Co.

Doherty, for the defendant Oliver.

ATTORNEY-GENERAL FOR ONTARIO v. NIAGARA FALLS, ETC., TRAMWAY CO.

Street railway—Operating on Sundays—Information to restrain.

The defendants, by letters patent issued under the Street Railway Act, R.S.O. c. 171, were authorized to build and operate, on all days except Sundays, a tramway in the town of Niagara Falls, &c.

Upon an information to restrain the defendants from operating their tramway on Sundays :—

Held, ROSE, J., dissenting, that the information would not lie, for no private right or property was involved, nor was any injury of a public nature done, and the powers of interference of the Courts will not be exercised merely to enforce performance of a moral duty.

W. M. Douglas, for the plaintiff.

A. G. Hill, for the defendants.

BRYDGES v. ONTARIO ROLLING MILLS COMPANY.

Master and servant—Accident in factory—Workmen's Compensation for Injuries Act—Defect in machine—Contributory negligence.

A bolt, used for holding in position the lower blade of a pair of steam shears in the defendants' mill, was too long, projecting outwards about four and a half inches, but there was no evidence

to shew that it was insufficient for the purpose for which it was made, or likely to cause injury by reason of its length. The plaintiff, who had previously seen others working at the machine, was put to work at it himself, and worked at it several times prior to the happening of the accident without injury, and apparently without fear of injury. When the accident happened he was feeding the machine with scrap iron, and a piece becoming too short to hold outside the guard, he held it down with another piece, and while doing so his fingers were caught and crushed.

Evidence was given that the accident would have been avoided by using tongs. No instructions were given to the plaintiff, except a warning to avoid letting his fingers get too close to the shears.

Held, that no defect in the machine was proved, and no negligence on the defendants' part was shewn, and therefore they were not liable for the injuries sustained by the plaintiff.

Quære, whether there was evidence of contributory negligence.

Bicknell, for the plaintiff.

Wallace Nesbitt, for the defendants.

[28TH JUNE, 1890.

HAWORTH v. KILGOUR.

Libel—Publication—Privileged occasion—Malice—Onus of proof.

The plaintiff and one S. had been partners. S. retired from the firm and left the country. Subsequently the plaintiff made an assignment for the benefit of his creditors, and the defendant, a creditor, was appointed one of the inspectors of the estate. S. wrote a letter to one F. referring to the plaintiff's business, and F. forwarded it to the defendant, who shewed it to his co-inspector, another creditor, and also to another person who had been the plaintiff's bookkeeper.

In an action against the defendant for libel in publishing the letter:—

Held, that the occasion of the publication was privileged, it having been shewn only to persons equally interested with himself in the matter, and being so privileged, that the *onus* was on the plaintiff to shew malice, if any.

J. Denovan, for the plaintiff.

Wallace Nesbitt, for the defendant.

LAWSON v. VILLAGE OF ALLISTON.

Municipal corporations—Obstruction in highway — Digging well under R. S. O. c. 184, s. 489—Accident—Negligence —Liability—Excessive damages—New trial.

The defendants, for the purpose of sinking a well in one of their public streets, to procure water for public purposes, under the powers conferred by s. 489 of the Municipal Act, R. S. O. c. 184, had erected a derrick in the street. The plaintiff had driven into the village past the derrick without its appearing to affect her horse, the derrick not then being at work, but on attempting to pass it on her way home, while the derrick was at work, the horse took fright, ran away, and threw the plaintiff out of her carriage, causing her a severe injury. The jury found that the derrick was of a nature to frighten horses, and that the defendants had not taken proper precautions to guard against accidents, and that there was no contributory negligence on the plaintiff's part.

Held, that the defendants were liable for the injury sustained by the plaintiff, but, as the damages were regarded as excessive, a new trial was directed unless the plaintiff assented to a reduction thereof.

J. A. McCarthy, for the plaintiff.

Lount, Q.C., for the defendants.

[BOYD, C., 5TH JUNE, 1890.

BOYD v. JOHNSTON.

Vendor and purchaser—Sale of equity of redemption—Liability of purchaser to pay off incumbrances.

A purchaser of an equity of redemption is bound, as between himself and his vendor, to pay off the incumbrances, and this quite irrespective of the frame of the contract between the parties.

Where, therefore, lands were conveyed by the plaintiff to the defendant which were subject to certain mortgages, the defendant was held bound to pay off, and to protect the plaintiff from liability thereon.

W. Cassels, Q.C., and *A. Skinner*, for the plaintiff.

Pepler, Q.C., for the defendant.

[MacMahon, J., 29th June, 1889.

McPHEE v. McPHEE.

Bills and notes—Non-negotiable promissory note—Indorsement of—Partnership—Character in which indorsement made.

Where a non-negotiable promissory note given for money lent to a firm is made by one member thereof and indorsed by the other, the character in which the indorsement is made will be implied from the purposes for which the note is given and the indorsement obtained, and the particular circumstances of the case.

Taylor McVeity, for the plaintiff.

O'Gara, Q.C., for the defendants.

[Street, J., 5th June, 1890.

ONTARIO NATURAL GAS CO. v. SMART.

Municipal corporations—By-law—Lease of highway—R.S.O. c. 184, s. 565—Right to take minerals—Natural gas a mineral—Quashing by-law—Public interest—Indemnity—Right to tap reservoir of gas adjacent to highway.

Mineral gas is a "mineral" within the meaning of s. 565 of the Municipal Act, R.S.O. c. 184.

The lease under that section should be of the right to take the minerals, and not of the highway itself.

The defendants the township of Gosfield passed a by-law and made a lease thereunder to their co-defendants "for the purpose of boring for and taking therefrom oil, gas, or other minerals." The quantity of land was no more than was necessary for the purpose, and the rights of the public were fully protected.

Held, that, although the lease should not have been of the highway itself, yet the practical difference was so small as not to constitute a ground for quashing the by-law.

The township council before passing the by-law insisted on an indemnity from their co-defendants against any costs and damages that they might render themselves liable to.

Held, that, under the circumstances, this could not be deemed to be evidence that the by-law was not passed in the public interest.

The plaintiffs by first sinking a well on the land near the part of the highway before mentioned did not acquire the right to

restrain the defendants from tapping the reservoir of natural gas lying under the land.

Robinson, Q.C., and *H. S. Osler*, for the plaintiffs.
Aylesworth, Q.C., for the defendants other than Walker.
W. H. Blake, for the defendant Walker.

[4TH JULY, 1890.

JOHNSTON v. McKENZIE.

Executors and administrators—Executor becoming bankrupt and intemperate—Injunction against acting—Receiver.

Where a person named as an executor was at the time of the making of the will in excellent credit and circumstances, but subsequently became insolvent and made an assignment for the benefit of his creditors, and also apparently became intemperate in his habits, an injunction was granted restraining him from interfering with the estate, and the appointment of a receiver was directed.

Hoyles, Q.C., for the plaintiff.
R. M. Meredith, for the defendant McKenzie.
J. Hoskin, Q.C., for the infant defendant.

IN CHAMBERS.

[BOYD, C., 27TH SEPTEMBER, 1890.

BREADY v. ROBERTSON.

Security for costs—Action against justices of the peace—53 V. c. 23—Character of property of plaintiff.

Upon applications under 53 V. c. 23, for security for costs in actions against justices of the peace, the rule should not be more, but rather less, onerous than in ordinary applications for security where the plaintiff is out of the country.

S. 2 of the Act provides that it is to be shewn that the plaintiff is not possessed of property sufficient to answer the costs of the action.

Held, that the Court should be less exacting as to the character of the property where the person is a *bona fide* resident than in the ordinary case of a stranger who seeks to justify upon pro-

perty within the jurisdiction; the test is: is it such property as would be forthcoming and available in execution.

And where the plaintiff had property, partly real and partly personal, to the value of $800 over and above debts, incumbrances, and exemptions, security for costs was not ordered.

A. D. Cameron, for the plaintiff.

Bicknell, for the defendants.

[FERGUSON, J., 9TH OCTOBER, 1890.

HEASLIP v. HEASLIP.

Costs—Taxation—Appeal to Master under Rule 854—Order upon appeal—Further appeal from order to Judge—Appeal from certificate of taxing officer—Costs between solicitor and client.

An appeal by the defendant in an action of alimony from the certificate of a taxing officer, upon taxation of the plaintiff's costs of the action and reference between solicitor and client, as directed by the judgment.

Pending the taxation there was an appeal by the plaintiff to the Master in Chambers under Rule 854, upon which the Master made an order allowing the appeal. The taxing officer in his certificate simply followed the order of the Master, and the present appeal was in respect only of the items in question before the Master. The order of the Master was not appealed from and the time for appealing from it had elapsed.

Held, that the appeal under Rule 854 should be looked upon as an intermediate thing and advisory in character, and that the defendant was not precluded from appealing from the certificate of the taxing officer because he did not appeal from the order of the Master.

Re Nelson, 13 P. R. 30, followed.

Re Monteith, 11 P. R. 361, distinguished.

Held, also, that where costs have to be paid by the opposite party and not by the client, there is no difference between "costs as between solicitor and client," and "costs between solicitor and client; both mean costs between party and party, to be taxed as between solicitor and client; and that the plaintiff was entitled to tax against the defendant under the words of the judgment only such costs as a solicitor can tax against a resisting client under the general retainer only to prosecute or defend

the action; but that the taxation should be as liberal as possible under the practice in favour of the plaintiff.

Cousineau v. *City of London Fire Insurance Co.*, 12 P. R. 513, followed.

A. Hoskin, Q.C., for the defendant.

C. Millar, for the plaintiff.

[ROSE, J., 26TH JUNE, 1890.

In re TORONTO BELT LINE R. W. CO. AND LAUDER.

Railways and railway companies—Warrant of possession—Application for—R.S.O. c. 170, s. 20, s-s. 3—County Judge—R.S.C. c. 109—Application of part one to company incorporated by Provincial statute.

The application for a warrant of possession of land required for a railway under s-s. 23 of s. 20 of R.S.O. c. 170 should be made to the County Judge, and not to a Judge of the High Court.

The applicants were incorporated under an Ontario statute, but their railway, being a connecting railway, was brought under Dominion control, as a work for the general advantage of Canada.

Held, that part one of R.S.C. c. 109 did not apply, being applicable only to railways constructed or to be constructed under the authority of a Dominion statute.

J. D. Edgar, for the applicants.

Delamere, Q.C., for the land-owner.

[30TH JUNE, 1890.

In re PARKER.

Extradition—R.S.C. c. 142, s. 5—Junior Judge of County Court—Justices of the peace—Officers of foreign state—Depositions not taken in presence of accused—Forgery—Evidence—Production and identification of forged instrument—Remand for further evidence.

The expression, "all Judges * * of the County Court," contained in s. 5 of the Extradition Act, R.S.C. c. 142, embraces the Junior Judge of a County Court.

On a charge of the forgery of a promissory note, alleged to have been committed in the State of Kansas, the persons before whom the depositions were taken were certified to be justices of the peace with power to administer oaths.

Held, that they were magistrates or officers of a foreign state within s. 10 of the Act, and that it was not necessary that they should be federal officers.

Held, also that it was not necessary that the depositions should be taken in the presence of the accused.

The depositions did not shew that the note alleged to be forged was produced and identified by the deponents or any of them.

Held, that this was a valid ground for refusing extradition, and that the Extradition Commissioner had no power to remand the accused to hear further evidence as to such identity.

R. M. Meredith, for the prisoner.

Aylesworth, Q.C., and *McKillop*, for the prosecutors.

[MacMahon, J., 23rd June, 1890.

REGINA v. CLARKE.

Summary conviction—Arraignment without summons or warrant—Plea of not guilty and enlargement—Waiver—Liquor License Act, R.S.O. c. 194, s. 70—Form of conviction under—Distress.

The defendant, being present at a police magistrate's court upon a charge which was disposed of, was, without any summons or warrant having been issued, then and there arraigned upon another charge, namely, of selling liquor without a license. The information was read over to him, to which he pleaded not guilty, and evidence for the prosecution was given. He thereupon asked for and obtained an enlargement till the next day, when on his not appearing he was convicted in his absence, and fined $50 and costs, and, in default of payment forthwith, sentenced to imprisonment.

Held, that under the circumstances the issuing of a summons was waived.

Held, also, that the conviction in awarding imprisonment in default of payment was properly drawn, for by s. 70 of R. S. O. c. 194, under which it was made, there is no power to award distress.

DuVernet, for the defendant.

J. W. Curry, for the prosecutor.

[Street, J., 29th August, 1890.

In re MITCHELL v. SCRIBNER.

Prohibition—Division Court—Order of Judge setting aside attachment—R. S. O. c. 51, s. 262.

Power over the process of his own Court is inherent in the Judge of a Division Court as well as of other Courts; and not-

withstanding the provisions of s. 262 of the Division Courts Act, R.S.O. c. 51, a Judge may set aside an attachment which has been improperly issued.

Douglas Armour, for the plaintiff.
Swabey, for the defendant.

[THE MASTER IN CHAMBERS, 1ST OCTOBER, 1890.

KELLY v. WADE.

Order of Court—Effect of not issuing—Abandonment.

Where an order was in June, 1889, pronounced by a Divisional Court, upon the application of the defendants, setting aside a judgment recovered by the plaintiff at the trial and directing a new trial, but was never issued:—

Held, that the original judgment must be considered to be still in force; and a motion to set aside execution issued thereon was refused.

Aylesworth, Q.C., for the defendants.
W. H. Blake, for the plaintiff's solicitor.

NEW BRUNSWICK.

In the Vice-Admiralty Court.

[WATTERS, J., 22ND AUGUST, 1890.

THE ERIC v. THE MAGGIE M.

Maritime law—Towage—Action in rem—Damage while in tow—Liability of tug for reasonable skill and care.

This was an action of damage brought by the owners of the schooner Eric against the steam tug Maggie M., for negligence in towing the Eric against the suspension bridge at the Falls.

The facts appear in the judgment.

WATTERS, J.—About 2nd May last the Mutual Benefit Ice Company of New York, by Mr. James D. Seely, their agent, chartered the schooner Eric to load a cargo of ice at a place above the Falls called the Clifton ice house; the consideration of the char-

ter was to be $2 per ton and free towage to be furnished by the charterers up to the place of loading, and back to this harbour. Mr. Seely selected the steam tug Maggie M. to perform this service. On 3rd May the tug took the Eric and another schooner—the Gleaner—in tow, and proceeded towards the Falls, when, the water being too high to allow the Eric to pass under the bridge, she struck against it and had her foremast head broken off, and sustained other damages. Mr. Weldon contends that, inasmuch as the tug was hired by the charterers and paid by them, there was no contract or mutuality between the owners of the Eric and the tug, and therefore no breach of contract between the Eric and the tug, and he contends that forasmuch as no action would lie by the tug against the Eric for the towage, therefore, the owners of the schooner can have no action against the tug for negligence in performing the contract. The schooner was, however, interested in the towing contract, although not a direct party to it; the charterers, in engaging the tug, were only carrying out their part of the contract with the owners of the schooner to furnish the towing power to enable the Eric to pass through the Falls for her cargo.

This suit, however, is not one for breach of contract, but is a proceeding *in rem*. I take it that the Eric having consented to be towed by the Maggie M., although employed by the charterers, it became the duty of the tug to use reasonable care and skill so as to avoid damage happening to the Eric; and if in the performance of her work she negligently towed the schooner against another vessel or a bridge, causing damage, she could be proceeded against *in rem*, and made liable under the statute for "damage done by a ship." The general rule of the maritime law will govern, viz., that there is a right of proceeding *in rem* against the vessel doing damage which cannot be taken away by any voluntary contract with a third party. The case of *The Tasmania*, 18 P. D. 110, cited by Mr. Weldon, does not apply. In that case, by the course of business and under the conditions of the notices issued by the steam tug company, of which the plaintiff was a director, he was precluded from bringing an action *in rem* or in *personam* against the Tasmania, which was a steam tug in the employ of plaintiffs' company, and was exempted from liability under the conditions of the company's printed notices.

The case of *The Isca*, 12 P. D. 34, also cited, was simply an action brought under the Imperial County Court Admiralty Act

for breach of a contract of towage, in which the Court held that the tug had been managed in an unseamanlike manner, and the tug was condemned in damages.

The question was also raised that this case does not fall within the words of the statute as "damage done by a ship." It is now held to be immaterial that the mischief complained of is not done directly by the vessel proceeded against. *The Energy*, L. R. 3 Ad. & Ec. 48, was a suit against a steam tug engaged to tow a vessel for negligently towing her so as to cause her to come into collision with and do damage to another vessel. So, *The Nightwatch*, Lush. 542, was a case where, by the improper navigation of a steam tug, vessel A. came into collision with vessel B. and sustained damage. It was held that this was damage done by the steam tug; the Court says: "I must take it that the Prince (the vessel towed) was by the improper navigation of the Nightwatch, which was towing her, brought into collision with the Julia. This was damage done by the Nightwatch." The case of *The Robert Pow*, 9 L. T. N. S. 287, does not appear to have been followed by any subsequent case. Next as to the duties of steam tugs. The law is clearly settled that when a steam tug engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so under all circumstances and at all hazards, but she does engage that she will use her best endeavours for that purpose. The steam tug is not a common carrier or insurer. She is bound, however, to bring to the performance of the duty she assumes reasonable skill and care and to exercise them in everything she undertakes until it is accomplished. The want of either in such cases is a gross fault, and she is liable to the extent of the full measure of the consequences. Thus a ship-owner entrusting his vessel to a steam tug to be conveyed, as here, through the Falls has a right to expect that the tug master possesses the requisite knowledge of the tides and dangers and difficulties of the navigation which he has to meet in the performance of that work; and here I must remark that parts of the evidence show a want of inquiry, study, and knowledge on the part of some of the witnesses engaged in this river towing business relating to distances, to the length of the spars of vessels to be towed, and to the extent of air space between the water and the bridge at the different heights of water —a species of knowledge and information indispensable for tug masters to study and acquire, in order to ensure the due perform-

ance of the work they undertake to perform, and for the preservation of the property entrusted to their care. Much conflicting testimony has been given as to the time the tug, with the Eric in tow, arrived at Rankin's wharf, the length of time she remained there, and the exact time when she reached the bridge. Upon a review of the whole evidence I am of opinion that too great delay was made at the wharf, and that the time so lost was aggravated by the tug undertaking to tow two vessels together at that particular state of the tide; that by the time she reached the bridge the water had risen too high to allow the Eric to pass under, which I have no doubt she could have done had the tug proceeded with the Eric alone, and reached the bridge half an hour or three-quarters of an hour earlier, which I have no doubt under the evidence could have been done. Under all the circumstances, I must hold the Maggie M. liable for the damage caused. The desire of the captain to tow both schooners together, and the delay occasioned by his long waiting at the wharf to suit the convenience of the master of the Gleaner, made him too late on the tide, and he then ran a risk which, I think, a prudent captain should not have done in the performance of so peculiar and perilous a service.

As to the damages to be allowed: It appears that the freight to be earned by the carrying of the cargo of ice has been lost, and after repairing, the Eric was obliged to accept a less remunerative charter. It is shown that the difference between the two charters amounts to $100, which must be taken to be the loss sustained on freight; to this must be added $198.98, being the sum paid for the repairs, making in the whole the amount of $293.98, for which I give judgment with costs.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J.

WINNIPEG & HUDSON'S BAY R. W. CO. v. MANN.

Railway company—Action by—Instructions for, given by president—Ratification—Absent directors—Proxies—Notice of meeting—Bonds, validity of—Charging land grant—Pledging bonds—Powers of president—Delegation of authority—Acquiescence.

Bill filed by a railway company against its contractors, praying a declaration that certain bonds issued by the plaintiffs were void and the issue thereof *ultra vires*, and that the delivery thereof was obtained by the defendants through fraud; and to repudiate that part of the contract under which the contractors were to get the bonds.

The bill was filed under instructions of the president, and without the authority of the board. His action had been ratified at a meeting of the directors, held without the usual notice being given. The president of the company held proxies of the absent directors enabling him to vote at directors' meetings.

Held, that while the votes of the absentees might be by proxy, it did not appear that notice to them of calling a meeting was dispensed with, or that the holder of their proxies could receive it for them.

It was objected that the bonds were invalid because they charged the land grant of the company, which could not be so charged.

Held, that, assuming the bonds not to be a valid charge upon the land grant, although expressed to be so, they would not be void as covenants to pay. A mortgage is not void because the mortgagee has embraced in it property to which he has no title and which he cannot mortgage. It will stand good so far as it affects the property which could be charged, as evidence of a debt, and a covenant to pay.

By its charter the plaintiff company had power to pledge its bonds "to raise money," for the building of the railway.

Held, that a pledge of the bonds as security for the payment of the contractors was *intra vires*.

A by-law authorized the president to "sell or pledge" bonds, "at such price or prices, and upon such terms and conditions, as he shall see fit."

Held, that the president in agreeing to give contractors bonds at fifty cents on the dollar, in default of paying cash, acted within the powers conferred on him.

The charter declared that "the bonds shall be made payable at such time, and in such manner, and at such place or places in the Dominion of Canada, or elsewhere, and bearing such rate of interest, as the directors shall think proper."

Held, that the directors could not delegate their authority to the president, and leave to his control and discretion the fixing of all these details.

Since the contractors claimed to have finished their contract, two statutes were passed in the interest and for the benefit of the company; one contained a recital that the company "has constructed and completed forty miles of the railway thereby authorized to be constructed and completed by the company"; the other recited that the company "have constructed forty miles of the said railway." No steps were taken to repudiate the contract, or to question the president's authority to enter into the contract, for two years. On the contrary, the company had sued the contractors upon the contract, and in an action by the contractors, upon the contract, against the company, judgment had been recovered for a portion of the contract price.

Held, that the contract made between the president and the contractors had been ratified by the company, and could not now be repudiated.

Bill dismissed as against all the defendants with costs.

Howell, Q.C., *Tupper*, Q.C., and *Phippen*, for the plaintiffs.

Ewart, Q.C., and *Munson*, for the defendants Mann, Holt, and Ross.

McLeod, for the defendants the Imperial Bank.

[DUBUC, J.

BRYAN v. FREEMAN.

Arrest—Capias—Name of defendant not in full—Affidavit to hold to bail—Cause of action—Nature of claim.

Summons by the defendant to set aside arrest under capias and subsequent proceedings.

Objection taken that name of defendant was not given in full in the affidavit to hold to bail nor in the capias. Defendant's name was stated to be Daniel F. Freeman, while his full name was Daniel Foster Freeman.

Held, bad.

Further objection that the cause of action was not sufficiently stated in the affidavit to hold to bail.

Held, that the Court will not interfere unless it is very clear that plaintiff has no cause of action.

The only amount in which defendant was indebted to the plaintiffs was $81.50; the amount of $131.50 in which he was ordered to be held to bail was made up by an account of $50 due by defendant to D. and assigned by D. to the plaintiffs.

Held, that there was no reason why an account duly assigned should not be considered a sufficiently good claim to obtain a capias, when the other particulars of the case would justify it.

Summons dismissed with costs.

C. P. Wilson, for the plaintiff.

Cassidy, for the defendant.

[KILLAM, J.

REGINA v. STARKEY.

Summary conviction—Liquor License Act—Rule to quash—Supersedeas—Certiorari.

The defendant was convicted and fined under the Liquor License Act. A rule was taken out to quash the conviction, but discharged on a technical ground. A motion was then made for a writ of supersedeas and procedendo to vacate the writ of certiorari which had been issued.

Held, that the rule to quash the conviction should be discharged, without prejudice to a further application, and that the certiorari should not be quashed or superseded, the application having never been determined upon its merits.

Cassidy, for the defendant.

Mulock, Q.C., for the justices.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

FERGUSON, J.] [3RD OCTOBER, 1890.

WRIGHT v. BELL.

Will—Construction—Per stirpes or per capita—Trusts—Infant trustee—Disclaimer—Statute of Limitations.

A testator, who died in 1840, by his will made in that year devised all his property to certain persons as executors and trustees upon trust for the maintenance and support of his wife and unmarried daughters as long as they should continue unmarried and live with his widow, and then directed that "when my beloved wife shall have departed this life and my daughters shall all have married or departed this life I direct and require my trustees and executors to convert the whole of my

estate into money to the best advantage by sale thereof and to divide the same equally among those of my said sons and daughters who may be then living and the children of those of my said sons and daughters who may have departed this life previous thereto."

Held, reversing the judgment of FERGUSON, J., that the division must be per stirpes and not per capita.

One of the executors and trustees, a son of the testator, was fifteen years of age at the time of the testator's death. He did not upon coming of age apply for probate of the will, though when probate was granted to the other executors leave was reserved to him to so apply, nor did he act in the execution of the trusts. He did not however in any way disclaim, and he knew of the will. In 1861, with the knowledge and consent of the acting trustee, he went into possession of certain lands that had belonged to the testator in his lifetime, believing, as he said, that the lands had been devised to him, and he remained in possession thereof for twenty years until the period of conversion and distribution.

Held, BURTON, J.A., dissenting, affirming the judgment of FERGUSON, J., that he was in law necessarily affected with notice of the provisions of the will and of the express trust thereby created, and that he must be held to have entered as trustee and not tortiously, and could not invoke the Statute of Limitations.

McCarthy, Q.C., and *H. S. Osler*, for the appellant.

S. H. Blake, Q.C., *J. K. Kerr*, Q.C., *W. N. Miller*, Q.C., *J. Reeve*, Q.C., *Hoyles*, Q.C., *H. T. Beck*, and *Lefroy*, for the several respondents.

ROBERTSON, J.]

BALDWIN v. KINGSTONE.

Will—Construction—Heir-at-law—Change in law after will made—Primogeniture — Mistake — Laches — Acquiescence — Family arrangement — Tenants in common—Statute of Limitations.

A testator, by his will made on the 14th of August, 1850, devised certain land to his widow for life and after her death to two nephews and in the case of the death of them or either of them in his own lifetime he devised the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his, her, or their heirs and assigns. The Act commonly known as the Act

abolishing primogeniture, 14 & 15 V. c. 6, was passed on the 2nd of August, 1851, and came into force on the 1st of January, 1852. One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866 and his widow in 1870.

Held, GALT, C.J.C.P., dissenting, affirming the judgment of ROBERTSON, J., 16 O. R. 841, that the Act abolishing primogeniture did not apply, (1) because the will was made before it was passed or took effect, and (2) because the land had been lawfully devised by the person who died seised; and therefore that the eldest son of the deceased nephew, as his common law heir, was entitled to the remainder in fee expectant upon the death of the widow.

Tylee v. *Deal*, 19 Gr. 601, approved.

Upon the death of the testator's widow the three surviving children of the deceased nephew (one daughter had died a short time before, intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made in which all parties joined, the instruments containing recitals as to the assumed tenancy in common and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew and one-sixth to each of the others. In 1885 a partition deed was executed of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards brought by him, asking that the title might be declared, the partition deed set aside, and the rents and proceeds of sales received by the brother and sister, repaid to him.

Held, affirming the judgment of ROBERTSON, J., that as all parties had acted under a mistake as to, and in ignorance of, the true legal construction of the will, the plaintiff was not barred by laches or acquiescence as far as the land unsold was concerned, but that there could be no recovery back of the moneys actually received by the brother and sister.

Cooper v. *Phibbs*, L. R. 2 H. L. 170; *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 234; and *Rogers* v. *Ingham*, 3 Ch. D. 351, considered and followed.

Held, further, in this also affirming the judgment of ROBERTSON, J., that as there was no consideration therefor, and no compromise or settlement of any disputed question, the partition deed and other dealings could not be supported as in the nature of family arrangements.

Held, also, GALT, C.J.C.P., dissenting, reversing the judgment of ROBERTSON, J., that the eldest son having always received a share of the rents and profits of the undivided moiety was in law always in possession of the whole of that moiety, and therefore that no title had been acquired against him by the brother and sister under the Statute of Limitations.

Robinson, Q.C., and *H. Cassels*, for the appellant.

Irving, Q.C., *McCarthy*, Q.C., *Moss*, Q.C., *G. M. Evans*, and *W. Barwick*, for the several respondents.

STREET, J.]

In re FLATT AND THE UNITED COUNTIES OF PRESCOTT AND RUSSELL.

Municipal corporation—By-law—Petition—Freeholder—R. S. O. c. 184, s. 9.

By the term "freeholder" as used in R. S. O. c. 184, s. 9, is meant a person actually seised of an estate of freehold, legal or equitable, and it does not include persons in possession of land under contracts for the acquisition of the freehold thereof upon the fulfilment of certain conditions.

Judgment of STREET, J., reversed; MACLENNAN, J.A., dissenting.

Shepley, Q.C., and *Bicknell*, for the appellants.

J. H. Ferguson, Q.C., and *J. B. O'Brian*, for the respondents.

FIRST D. C., YORK.] [OSLER, J. A., 18TH OCTOBER, 1890.

WOOD v. JOSELIN.

Assignments and preferences—Garnishment of debt—Subsequent assignment of primary debtor—Priorities—R.S.O. c. 124, s. 9.

An assignment for the benefit of creditors by a primary debtor after a garnishing summons has been duly served upon him and

the garnishee, and judgment has been obtained thereon, does not intercept or take precedence of the judgment, and the primary creditor may enforce payment by the garnishee.

Judgment of the first Division Court of York reversed.

Shepley, Q.C., for the appellant.

Woodworth, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[BOYD, C., 11TH OCTOBER, 1890.

TREMEEAR v. LAWRENCE.

Solicitor's lien—Costs of actions to restrain sale of estate—Lien upon estate in hands of assignee—Absence of fund upon which lien could attach—Costs.

Two actions were brought by a trader, to restrain proceedings under a chattel mortgage against the trader's stock of goods, and interlocutory injunctions were granted, but the actions were not carried further. The chattel mortgagee brought an action to recover the mortgage money and to restrain the mortgagor from selling the goods, whereupon the latter made an assignment for creditors, and, by arrangement in that action, the goods were sold by the assignee, and payment was made in full to the mortgagee for debt, interest, and costs of that action, after notice and without objection on the part of any of the creditors or of the solicitor who conducted the actions brought by the trader.

The solicitor claimed that by his exertions in these actions he had saved the goods from being sacrificed by summary sale, and brought this action to have it declared that he was entitled to a preferential lien for costs upon the estate in the hands of the assignee.

Held, that, even if it were shown that stopping the sale under the mortgage were a benefit to the estate, there was no jurisdiction without the direction of a statute, to charge the property

recovered or preserved, and without a money fund there was no subject for a lien.

Costs as of a successful demurrer only were allowed to the defendant.

Colin McDougall, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

[18TH OCTOBER, 1890.

KENT v. KENT.

Husband and wife—Conveyance of land to wife directly—Devise of land by wife—Tenancy by the curtesy—Adverse possession—Statute of Limitations—Infants—R. S. O. c. 111, s. 48—Devise of land conveyed to married woman by strangers.

A conveyance of lands from a husband to his wife directly was made in 1870, was expressed to be in consideration of "respect and of one dollar," was in the usual statutory short form, and was duly registered. The marriage was in 1854.

Held, that the lands passed by the conveyance to the wife as her separate property.

The wife died in 1872, having made a will leaving her real estate to her two daughters, then aged respectively seventeen and twelve. The father remained in sole possession from the mother's death till his own death in 1890. This action was begun in 1890 by the younger daughter and the son of the elder to recover possession from the devisee of the husband.

Held, that the husband had no title by the curtesy, because he was excluded by the devise to the daughters of the lands conveyed by him to his wife; he was therefore not rightfully in possession as against the daughters; and, as the younger daughter had by R. S. O. c. 111, s. 48, only five years after coming of age to begin proceedings, the action was barred as to these lands.

Other lands were conveyed to the wife by strangers in 1867 and 1869, of which the husband also remained in possession after her death.

Held, that the devise of these lands by her did not affect the right of her husband as tenant by the curtesy, and his possession was in that character; and therefore as to these lands the action was not barred.

Gibbons, Q.C., and *George McNab*, for the plaintiffs.

W. R. Meredith, Q.C., and *E. R. Cameron*, for the defendant.

[STREET, J., 6TH SEPTEMBER, 1890.

MARTHINSON v. PATTERSON.

Chattel mortgage—Defect—Taking possession—Rights as against subsequent mortgage—Full amount of mortgage money not advanced—Effect of—Foreign contract as to chattels in Ontario.

A defect in a chattel mortgage is not cured, as against a subsequent mortgagee, by taking possession of the chattels, where the subsequent mortgage was made before such possession, although at the time of the seizure there was no default under the subsequent mortgage and the mortgagor was by the terms of it entitled to retain possession until default.

Where the full amount mentioned in a chattel mortgage is not actually advanced at the date at which it is given, it should, nevertheless, in the absence of fraudulent intent or bad faith, stand as against a subsequent mortgagee as a security for the amount actually advanced at the time when the subsequent mortgagee's rights accrued.

The rights of parties resident in a foreign country and there making a contract in regard to goods in Ontario, are governed by the law of Ontario.

River Stave Co. v. *Sill*, 12 O. R. 557, followed.

Shepley, Q.C., for the plaintiff.

Masson, Q.C., for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 4TH SEPTEMBER, 1890.

McCLURE v. BLACK.

Patent to land—Locatee receipt—Fraudulent locatee—Statute of Limitations—R. S. O. c. 24, s. 16.

The plaintiff in 1855 obtained from the Commissioner of Crown Lands a receipt on sale of a certain lot of land. In 1868 one Beaton, in whose possession this receipt was, handed it back to the Crown Lands office, and by means of fraud procured his own name to be substituted as purchaser in the books of the department; and he and those claiming under him, in-

cluding the defendant, had remained in possession of the lot ever since. In 1872 the plaintiff having learned of the imposition applied to the Department for redress. This application was pending and undisposed of by the Commissioner of Crown Lands till 14th March, 1889, when it was ordered that the patent should issue to the defendant, but three months were allowed to the plaintiff to take proceedings in Court to establish his title.

Held, that the plaintiff's right of action was not barred by any statute of limitations.

Per BOYD, C.—The case might be likened to a matter litigated in the proper forum, wherein no decision is given till after the lapse of years, in which case, pending judgment, the Statute of Limitations cannot operate to vest or divest rights, but must be deemed suspended.

W. Cassels, Q.C., for the defendant.

H. P. O'Connor, Q.C., for the plaintiff.

STILLIWAY v. CITY OF TORONTO.

Municipal corporation—Action for negligence—Claim over, under R. S. O. c. 184, s. 531—Judgment against third party—Amendment.

The plaintiff brought this action against the city of Toronto for damages for injuries sustained through a defective sidewalk. Before pleading the defendants applied under R. S. O. c. 184, s. 531, and obtained an order making O. a party defendant, and in their defence alleged that O. was responsible for the defect in the sidewalk.

O. also delivered a full defence to the action and took part by counsel at the trial.

A verdict was rendered for $400 damages, and the jury found O. was responsible for the cause of the accident.

After verdict the plaintiff applied for leave to amend the statement of claim by claiming directly against O., which leave was granted, and judgment entered against O. for the damages with full costs of suit, and dismissing the action with costs as against the city.

Held, that the amendment was rightfully allowed, and the judgment should not be disturbed.

W. N. Miller, Q.C., for the plaintiffs.

C. R. W. Biggar, Q.C., for the defendants the city of Toronto.

J. K. Kerr, Q.C., for the defendant Ogden.

[6TH SEPTEMBER, 1890.

ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR ONTARIO.

Constitutional law—Validity of 51 V. c. 5—Lieutenant-Governor—Pardoning power.

Held, that the Act of the Ontario Legislature, 51 V. c. 5, being an Act respecting the executive administration of the laws of this Province, is *intra vires*.

Per Boyd, C.—No change is arrived at by the Act in the office of Lieutenant-Governor as such; but rather important and congruous functions are sought to be added thereto, to be administered by that chief public officer by whom, through the Dominion, the Province is connected with the Queen. As to section 2, relating to the pardoning power, the power to pass laws implies necessarily the power to execute or to suspend the execution of those laws, else the concession of self-government in domestic affairs is a delusion. Sovereign power is a unity, and though distributed in different channels and under different names it must be politically and organically identical throughout the Empire. The local legislature which creates the offence has power to suspend the sentence, to commute or remit the punishment. The royal prerogative, in its large sense, as exerciseable in reference to crime this statute does not purport to interfere with. It may be classified as one made in relation to the imposition of punishment; or from another point of view as one for the administration of justice in the Province.

C. Robinson, Q.C., and *Lefroy*, for the plaintiff.

E. Blake, Q.C., and *Irving*, Q.C., for the defendant.

SAWYER v. PRINGLE.

Sale of goods—Property not passing till full payment—Resuming possession—Action for balance of purchase money after resale.

The plaintiffs sold to the defendant a traction engine and separator, under a written agreement whereby it was provided that the defendant should give three promissory notes for the price; and that on default of payment of any of the notes the whole price should become payable; and that no property should pass to the

defendant in the machine until the whole price was paid; and the vendors might resume possession on default, or for other good cause.

Default occurring, the vendors resumed possession and resold the machine; and after crediting on the notes what the machine brought on the re-sale, they sued the defendant for the balance of the notes.

Held, per BOYD, C., that they had a right so to do; for the agreement gave a right of action for the full price upon default in payment, and a concurrent right to resume possession of the machine. The mere fact of selling the machine had not any other effect than to fix the value of the machine as deteriorated by the defendant's user of it.

Held, per ROBERTSON, J., that the plaintiffs had no right to recover. By resuming possession they to all intents put an end to the contract. They were not necessarily bound to assume that position; they could have sued on the promissory notes and left the possession in the defendant; but having elected to resume possession, they had no cause of action for whatever might be due on the purchase money.

The Judges composing the Divisional Court being divided in opinion, the judgment of ARMOUR, C.J., the trial Judge, in favour of the defendant was affirmed.

Hoyles, Q.C., and *James Chisholm*, for the plaintiffs.

J. M. Clark, for the defendant.

[18TH OCTOBER, 1890.

CENTRAL BANK OF CANADA v. GARLAND.

Banks and banking—Discount of promissory notes—Right of bank to recover accessory securities.

A tradesman sold goods to customers taking promissory notes for the price and also hire receipts by which the property remained in him till full payment was made. The notes were discounted through the medium of a third person by the plaintiffs, who were made aware when the line of discount was opened, of the course of dealing and of the securities held. They were not, however, put in actual possession of the securities, and there was no express contract in regard to them.

In an action to recover the securities or their proceeds from the assignee for creditors of the tradesman :—

Held, that the securities were accessory to the debt; that in equity the transfer of the notes was a transfer of the securities; that the defendant was in no higher position than his assignor, and could not resist the claim to have the receipts accompany the notes; and that it was not material that the relation of assignor and assignee did not immediately exist between the tradesman and the plaintiffs.

W. R. Meredith, Q.C., for the plaintiffs.

Watson, Q.C., and *Masten*, for the defendant.

[BOYD, C., 27TH SEPTEMBER, 1890.

HALL v. HOGG.

Mechanics' lien—Material men—Time for registering claim—R. S. O. c. 126, s. 21.

Merchants supplied materials to the contractor for certain buildings, and claimed a lien under the Mechanics' Lien Act in respect thereof. There was no contract for the placing of these materials upon the property; the last of them were bought by the contractor from the merchants on the 22nd November, and were by him placed in the building on the 23rd November.

Held, that the time for registering the claim of lien, under s. 21 of the Act, R. S. O. c. 126, began to run from the 22nd November.

J. A. Macdonald, for the plaintiffs.

Bain, Q.C., for the defendant Howland.

[30TH SEPTEMBER, 1890.

ELLIOTT v. ELLIOTT.

Landlord and tenant—Covenant to expend manure upon the premises—Manure made after expiry of term—Mesne profits—Claim in former action—Estoppel.

A married woman lessee covenanted to use upon the demised premises all the straw and dung which should be made thereupon :—

Held, that the lessor was entitled to recover for manure removed from the premises which was there at the expiry of the term, but not for manure made thereafter, while the lessee was overholding.

Hindle v. Pollitt, 6 M. & W. 529, followed.

In a former action of ejectment brought by the plaintiff against the defendants, mesne profits were claimed, but no evidence was given in regard to them :—

Held, that the plaintiff was not estopped from recovering in this action occupation rent for the premises since the expiry of the term.

J. B. Clarke, Q.C., and *J. B. Jackson*, for the plaintiff.

Middleton, for the defendants.

WOOD v. STRINGER.

Mechanics' lien—Ascertainment of amount due to contractor—Parties—Registered owner not liable on contract—Work and labour—Acceptance of bad work—Congregation occupying church—Reduction of price for bad work—Measure of—Extras—Written order for.

In an action to enforce a mechanics' lien, brought by materialmen against the contractor and the registered owner, the contest was as to whether anything was due to the contractor, and the registered owner was not liable on the contract.

Held, that the amount due to the contractor could not be ascertained without the persons liable on the contract being brought before the Court.

The work in question was the building of a church. The last of the work done was the pews, and as they were being put in objection was made by the architect to their material and workmanship.

Held, that the occupying of the church with the pews objected to in it was not an acceptance of the work.

Held, also, that a reduction of the contract price by an amount equal to the difference in value between the bad stuff and that which should have been used was not an adequate measure of the set-off to which the proprietors were entitled.

The contract provided that no extras were to be allowed unless expressly ordered and payments for the same expressly agreed for in writing by the proprietors or architects.

Held, that extras could not be allowed unless a writing was proved.

F. E. Hodgins, for the plaintiffs.

James Reeve, Q.C., for the defendant Colville.

[10TH OCTOBER, 1890.

In re TOWNSHIPS OF HARWICH AND RALEIGH.

Drainage—Arbitration and award—Municipal corporations—Arbitration under s. 590 of R. S. O. c. 184—Constitution of board of arbitrators—"Interested," in s. 389, meaning of.

A question arose under s. 590 of the Municipal Act, R. S. O. c. 184, between the townships of H. and R., whether H. caused waters to flow on R. to the detriment of R. which ought to be drained from R. at the expense of H. The township of T. also discharged waters over the other side of R., opposite H.

Held, that T. was not "interested" within the meaning of s. 389 of the Act; and therefore that a board of three arbitrators appointed, pursuant to that section, one by each of the three municipalities, was not properly constituted to determine the question; and their award was set aside.

M. Wilson, Q.C., for the township of Harwich.

W. R. Meredith, Q.C., and *William Douglas*, Q.C., for the township of Raleigh.

[28TH OCTOBER, 1890.

HALL v. HOGG.

Costs—Mechanics' lien action—Parties—Attacking status of lien-holders—Costs of owner—Costs of lien-holders—Scale of costs.

In an action by lien-holders to enforce their lien under the Mechanics' Lien Act it is not necessary to make other holders of registered liens parties in the first instance in order to attack their status as lien-holders; but this can be done where they are added as defendants in the Master's office.

The amount due from the owner to the contractor should be paid into Court by the latter, less his costs, which should be taxed as to a stakeholder watching the case.

The costs of lien-holders establishing their liens should be paid as a first charge on the fund.

The costs of lien-holders subsequent to judgment of reference should be taxed upon the scale appropriate to the amount found due to each.

J. A. Macdonald, for the plaintiffs.

A. Hoskin, Q.C., for the defendant Fewtrell.

C. W. Kerr, for the defendant Howland.

C. Henderson, for the defendant Radcliff.

[MacMahon, J., 15th July, 1890.

GORDON v. PROCTOR.

Estoppel—Fraudulent preference—Mortgagee attacking title of mortgagor.

Held, that an assignee of a mortgage is not estopped as such from attacking the conveyance to the mortgagor as fraudulent and void, while nevertheless maintaining his mortgage as a valid incumbrance.

Clute, Q.C., for the plaintiff.

Osler, Q.C., and *J. W. Kerr*, for the defendants Proctor and Hagerman.

Watson, Q.C., for the defendants W. and J. Leary.

W. R. Riddell, for the defendants Christopher Leary and Edmison.

COMMON PLEAS DIVISION.

[Boyd, C., 16th October, 1890.

AYERST v. McCLEAN.

Parties—Action of forec'osure—Mortgage made after 11th March, 1879—Wife of mortgagor—Dower.

The wife of a mortgagor who has joined in a mortgage, made after 11th March, 1879, only for the purpose of barring her

dower, is properly made a defendant to an action of foreclosure, in order that she may either redeem or protect her interest by asking for a sale; and being so made a defendant, and submitting to a foreclosure, no question could arise as to her dower being effectually extinguished.

If the mortgage is before the Dower Act of 1879, the case is governed by the former law; therefore, the date of the mortgage is material, not that of the marriage.

Report of *Re Hewish*, 17 O. R. at p. 457, corrected.

T. R. Ferguson, for the plaintiff.

Pepler, Q.C., for the defendant Margaret McClean.

IN CHAMBERS.

[BOYD, C., 22ND OCTOBER, 1890.

CLARKE v. CREIGHTON.

Costs—Execution for—Rule 863—"Immediately"—Set-off—Rule 1205—"Interlocutory"—Costs after judgment—Solicitor's lien—Divisions of Court—Entitling papers—Amendment.

The word "immediately" in Rule 863 means "instanter"; and a party to whom costs are awarded by an order may issue execution therefor on the day of the taxation.

Proceedings may be considered "interlocutory" within the meaning of Rule 1205 till satisfaction is obtained in respect of the moneys, costs, or subject-matter in controversy; and where judgment was given for payment by the plaintiff to the insolvent defendant of the costs of the action, and the defendant's solicitors were by an order declared to have a lien upon such judgment, and the plaintiff became entitled against the defendant to costs of garnishing proceedings upon the judgment, begun before the solicitor's lien was declared, a set-off was allowed.

This action was in the Queen's Bench Division; but the plaintiff, in applying with respect to the costs of writs of *fi. fa.* and a set-off of costs, entitled his proceedings in the Chancery Division and "in the matter of certain orders made in the action."

Held, that this was formally wrong; but an amendment was allowed on payment of costs.

S. R. Clarke, the plaintiff in person.

A. H. Marsh, Q.C., for the defendant.

PATERSON v. DUNN,

Pleading—Slander—Particulars.

In an action of slander, the statement of claim, after various specific allegations, charged that at divers times during the years 1888, 1889, and 1890, and to many people in and about the city of T., the defendant falsely and maliciously repeated the said slanders and words of like effect, and spoke of the plaintiff words conveying the meaning the said slanders and the said words conveyed.

Held, that this was embarrassing and should be stricken out unless the plaintiff elected to amend upon payment of costs.

F. W. Garvin, for the plaintiff.

Middleton, for the defendant.

In re SOLICITORS.

Solicitor and client—Taxation of bill of costs by assignee for creditors of client—Costs of taxation—Assignee personally entitled—Set-off.

The parties who initiate and intervene upon the taxation of a solicitor's bill of costs become personally liable to pay the costs of taxation.

And where solicitors rendered to the assignee of an insolvent their bill for services to the insolvent, and the assignee taxed the bill and had it reduced by more than one-sixth :—

Held, that he had a right personally to recover from the solicitors the costs of the taxation, and that there should be no set-off against the amount coming to the solicitors from the estate of the insolvent as a dividend upon their bill.

Where authorities acted upon were not cited, no costs were given.

Delamere, Q.C., for the solicitors.

Aylesworth, Q.C., for the assignee.

[28TH OCTOBER, 1890.

CRABBE v. HICKSON.

Discovery—Particulars—Action for wrongful dismissal—Defence of misconduct.

In an action for wrongful dismissal, where the defence is misconduct generally, it is proper to direct particulars shewing the nature and character of the instances relied on by the employer; these particulars should set forth the dates, substantial particulars, and circumstances of all the instances and occasions wherein and whereon the plaintiff misconducted himself, on which the defendant means to rely; and leave should be given to supplement with further particulars if discovered before trial.

F. D. Armour, Q.C., for the plaintiff.

W. R. Smyth, for the defendants.

[FERGUSON, J., 14TH OCTOBER, 1890.

SANVIDGE v. IRELAND.

Solicitor's lien—Settlement of action by parties without intervention of solicitors—Order for costs—Notice before money paid—Notice to solicitor instead of party personally.

Where a compromise of the action has been effected between the parties without the intervention of the solicitors, in order to entitle the plaintiff's solicitor to enforce his lien for costs upon the fruits of the litigation, by means of an order upon the defendant, collusion must be shewn, or the act complained of must have been done after notice from the solicitor complaining.

And where the parties made such a compromise, and the plaintiff's solicitor gave notice to the defendant's solicitor after the agreement but before payment of the money agreed upon:—

Held, that this was sufficient notice.

Tytler, for the plaintiff's solicitors.

J. A. Macdonald, for the defendant.

NOVA SCOTIA.

In the Supreme Court.

HOLMES v. BONNETT.

Judgment entered inconsistent with findings—Findings set aside as against evidence.

A deed was attacked as fraudulent and void, and the trial Judge submitted a number of questions to the jury, in answer to which they found, *inter alia*, that the deed was given for valuable consideration and not to delay or defraud creditors, but it appeared that the value of the property was greatly in excess of any cash consideration paid, although other elements of consideration were relied on by the defendants. Judgment was thereupon given that the grantee be declared a trustee for the plaintiff as to the difference between the value of the property and the amounts paid to and due from the grantor.

Held, per RITCHIE and TOWNSHEND, JJ., that although the judgment was justified by the evidence, it could not stand under the findings of the jury in favour of the defendants, and the plaintiff having appealed to set aside the findings, those which tended to sustain the deed and were not justified by the evidence should be set aside.

Per WEATHERBE and SMITH, JJ., that the findings were justified by the evidence and the deed should stand good in its entirety.

McLEOD v. CHETWYND.

Appeal from County Court—Findings of Judge against evidence.

The Court will not usually interfere with the findings of the County Court Judge who has tried the cause and seen the witnesses, but where the evidence manifestly preponderates in favour of the party against whom the Judge has decided, and no

satisfactory reasons are given for the decision, the Court will exercise an independent judgment.

One of the defendants having denied his liability as a partner, the evidence was in the judgment of the majority of the Court incompatible with the judgment of the County Court in favour of the defendant, and the appeal was allowed.

WEATHERBE, J., dissented from the view of the evidence taken by the majority.

NEW BRUNSWICK.

In the Supreme Court.

[10TH OCTOBER, 1890.

Ex parte BRENNAN.

Canada Temperance Act—Petition to Governor-General—Proclamation—Order-in-Council.

This was an application for a rule to set aside a conviction made by two justices of the peace in the parish of Lancaster, in the city and county of Saint John, under the Canada Temperance Act. The petition directed to His Excellency the Governor-General for the purpose of bringing the second part of the Act into force, was a petition of "the electors of the city and county of St. John (exclusive of the city of St. John and the city of Portland) in the Province of New Brunswick." The proclamation published in the *Canada Gazette* and issued in pursuance of the petition recited it as "The petition of the electors of the city and county of Saint John," leaving out the words "exclusive of the city of St. John and the city of Portland," and the Order-in-Council issued for the purpose of bringing the Act into force, declared the second part of the Canada Temperance Act, 1878, shall be in force and take effect in "the said county of the city and county of Saint John." It was contended that the second part of the Act was not in force in the county of Saint John because the petition did not authorize the proclamation which was

made; that the proclamation did not authorize the election which was held; and that the Order-in-Council bringing the Act into force was not authorized either by the petition or the election held.

Held, that the proclamation did substantially follow the petition. The object of the notice sent to the Secretary of State for Canada was that an election might be held in that part of the "city and county of Saint John" outside the two cities, namely, in the parishes; and the petition would have shown that intention if the words "exclusive of the city of Saint John and the city of Portland" had been left out. It was not necessary to use these words in order to exclude the two cities, and that the words "city and county of Saint John" did not include cities, is manifest from R. S. C. c. 106, s. 2 (*b*), which enacts that the expression "county" includes every town, township, parish, and other division or municipality, except city, within the territorial limits of the county. It therefore followed that every city within the territorial limits of the county is excluded; and therefore the cities of St. John and Portland within the territorial limits of the city and county of St. John were excluded by the proclamation, which was consequently the same as the petition.

G. G. Gilbert, Q.C., for the applicant.

I. A. Jack, contra.

WETMORE v. BELL.

Evidence—Ejectment—Defence of title by possession—Statements of defendant's grantor in favour of his own title—Improper admission of evidence—Reading to jury paper not in evidence—New trial.

In an action of ejectment, the defendant set up title by possession, claiming under C. W., a son of the person by whom the land had been conveyed to the plaintiff.

The defendant gave the following evidence, which was admitted contrary to the objection of the plaintiff:—

"C. W. told me he was twenty years in possession of the land and it was his and had been willed to him; he told me his deed was given and it was his property; he said his mother got mad at him for marrying E. A. and tried to take it away from him

through spite, but he could give a good deed, for he had talked to a lawyer about it; I told him if he could I would buy it and pay him for it, and I did; he said he had undisputed possession for twenty-four years until his mother died, and four years since."

Held, that the evidence was improperly received; it was what C. W. had said in support of his own title, and therefore of the defendant's title.

Another witness, a daughter of C. W., upon cross-examination by counsel for the defendant, was shown a paper and asked if that was not her signature on it. She said it was. Counsel for the plaintiff objected to its being put in the witness's hands, as it was not in evidence, but the trial Judge allowed it to be shown to the witness. Counsel for the defendant then read it aloud, and asked the witness if her father had not stated that he had made the declaration contained in the paper, under oath, in the presence of his mother. The witness answered, "Not in my presence."

Held, that this was an attempt, and a successful attempt, by a side wind, to get before the jury a declaration said to have been made by C. W. at the time he sold to the defendant, now that the mother, in whose presence it was said to have been made, was dead and could neither affirm it nor deny it; that the counsel should not have been permitted to read the paper aloud, and a verdict obtained on such evidence could not stand.

George F. Gregory, for the plaintiff.

Blair, A.-G., for the defendant.

BROWNELL v. BLACK.

Medical practitioner—Action for malpractice—Expert medical testimony—Method of examining—Proper and improper evidence—New trial refused.

The defendant was a medical practitioner and charged with having treated the female plaintiff in a careless, negligent, and unskilful manner, whereby she was injured in her health. The plaintiffs attempted to establish that the wife's illness was caused by an overdose of strychnia. The defendant denied this and said that she was suffering from hysteria or mental idiosyncracy. A verdict was rendered for the defendant, and a new trial was

moved for on the ground of the improper admission of evidence upon the examination in chief of several of the defendant's witnesses and on the cross-examination of several of the plaintiff's witnesses.

The objections taken were classed under the following heads:

(1) In reading to a witness, a medical man, portions and allowing witness himself to read portions of works which the witness stated were standard medical works, and then examining the witness in reference thereto.

(2) In showing to a medical witness, while under cross-examination, a medical work which he said was good authority and a diagram or picture in such book as explanatory of the subject treated and examining the witness in reference to such diagram.

(3) In showing the diagram or picture to the jury.

(4) On the examination in chief of a medical witness, in allowing the following question to be put, and admitting the answer:—

Q.—Having diagnosed for hysteria from the symptoms stated, would strychnia be a remedy properly applicable?

A.—One of the best remedies. It could be given alone or in conjunction with others.

(5) On the examination in chief of another doctor in admitting the following evidence:—

The stenographer having read the defendant's evidence,

Q.—Assuming that to be true, what would that be symptoms of?

A.—There are not symptoms enough to form an opinion, but they rather indicate nervous affection.

Q.—What disease would you judge she was labouring under?

A.—Judging from the spasms and pain in back I would be rather led to believe it was hysteria. Those are the two important symptoms. The crying might arise from other causes, debility of the system.

Q.—In connection with hysteria is the system likely to be debilitated?

A.—It is liable to be.

Q.—If you diagnosed it was hysteria, would strychnia be a proper treatment?

A.—It would be proper, particularly in a run down constitution; I mean by a run down constitution her then present condition.

The judgment of the Court was delivered by

FRASER, J.—As to the first class of objections I think that the counsel had a right to read to a medical witness portions of medical works admitted to be standard works, and also to allow the witness to read the particular portions of the work for himself and then to examine the witness in reference thereto. This is the fairest method of examining under the circumstances. As to the 2nd and 3rd objections, the diagram was illustrative of the subject treated in the text. It was not a picture made for the purpose of the trial to be shown to the witness and perhaps distorted for effect; but made by the author with a view of making more clear to the reader the meaning of his text, nor was it objectionable to shew this to the jury.

I think the question and answer under the 4th head were both proper. If the question was objectionable (I do not say it would be) as being too leading, that is not a ground of objection stated.

The answer made to the fifth head was that the evidence was admissible, but at all events it was given without any objection taken to it, and the reporter's notes sustain this answer, which therefore disposes of the last objection.

The illustrations were shown to the witness and his opinion thereof taken, and, if that was rightly done, then the jury might properly be shown the diagram.

New trial refused.

H. R. Emerson, for the plaintiff.
D. L. Hanington, Q.C., for the defendant.

WINSLOW v. VERNOR.

Promissory note—Accommodation indorser—Security for mortgage—Mortgage sale—Rights of surety—Demurrer.

This was a demurrer to the plaintiff's second and third replications to the defendant's fourth and fifth pleas. The action was brought against the defendant as indorser of a promissory note. The special pleas alleged in effect that the defendant indorsed the note for one Coy, for his accommodation and as his surety only, and that the note when paid was to be credited on a mortgage of one Peters to Fraser and the plaintiff, on the ferry boat *Douglas*; that there was no consideration for indorsing the note

by the defendant; that the plaintiff accepted the note with a knowledge of the premises; and that afterwards and while the plaintiff was holder of the note, without the knowledge or consent of the defendant, the plaintiff, acting for himself and Fraser, sold the ferry boat *Douglas* and had it bid in. In reply to these pleas, the plaintiff said that Coy purchased from Peters the ferry boat, upon which there were two mortgages, the first in favour of Fraser and the plaintiff; that Peters agreed with Coy to take from him in payment for the ferry boat the note in question, and undertook that when the note was paid he would get both the mortgages discharged; that the note was delivered to the plaintiff, and when paid the amount was to be credited on the mortgage held by Fraser and the plaintiff; that after the note had been dishonoured for non-payment Coy was desirous of obtaining title to the boat, and he and Peters requested the plaintiff to foreclose this mortgage and make a sale thereunder, so as to enable Coy to become the purchaser of the boat; that the boat was, in accordance with this request, sold at public auction and knocked down to Coy, it being agreed that when the note was paid the necessary papers should be prepared to vest the title in Coy; that Fraser and the plaintiff had always been ready to complete Coy's title upon payment of the note.

The judgment of the Court was delivered by

TUCK, J.—The principal ground of demurrer to the replication is that it alleges an agreement by the plaintiff with the maker of the note to sell the property for which the note was given, and that the sale and bidding in of that property by Coy without notice of the agreement or sale to the defendant, and without his consent, relieved the defendant from all liability on the note, as he was only surety or accommodation indorser. The substantial question to be determined is whether or not the foreclosure of the mortgage and sale of the boat as stated caused such a change in the rights of the surety as to discharge him. I fail to see what rights the defendant had which were prejudiced by the sale of the boat under the mortgage, and by Coy bidding it in when offered at auction. By this sale the defendant's position was not altered. He had the same security for the payment of the note as regards the boat after the sale as before it. If the defendant or any other person were to pay the note, the mortgage to Fraser and the

plaintiff would have to be discharged. No agreement which may have induced the defendant to indorse the note has been violated, and his relation to the surety is the same now as before the sale. When the note is paid and by whomsoever paid the surety is gone. If Fraser and the plaintiff discharged their mortgage without getting payment of the note, the defendant might have reason to complain, but their mortgage is still in full force. If the defendant had any security when he indorsed the note that it would be paid, the same still exists. The sale of the boat in the manner stated in the replication did not and could not have injured him.

Judgment for the plaintiff on demurrer.

D. Jordan, for the plaintiff.

J. D. Hazen, for the defendant.

SIVRET v. DEGOUCHY.

Landlord and tenant—Distress for rent—Removal of goods after distrained —Trespass—Case—Judge's charge to jury.

This was an appeal by the defendant from the Gloucester County Court. The action was trespass for breaking and entering the plaintiff's barn and carrying away a quantity of hay, oats, and straw. The defendant pleaded "not guilty," and justified under a distress warrant for rent in arrear. The distress warrant was issued 5th September, 1887. When the plaintiff first went into possession the premises were owned by R. & Co., who subsequently sold to the present owners, whose agent the defendant was. The jury found for the plaintiff. The principal grounds taken on appeal were: (1) That the action was case, not trespass; (2) That the Judge of the County Court in charging the jury told them that before the notice of justification could operate as a justification they must be satisfied of two things: (*a*) that there was rent in arrear; and (*b*) that the goods had been distrained on the premises.

Held, that trespass was the right form of action.

2. That the County Court Judge when he pointed out to the jury the evidence of the agent of R. & Co. that rent was in arrear, and that this was denied by the plaintiff, should also have called the attention of the jury to the statement of the

plaintiff on cross-examination, that he had paid rent in October, 1887, virtually admitting that he owed rent in September, 1887.

3. That as to whether or not the goods were distrained on the premises, which the Judge left to the jury to decide between the evidence of the plaintiff and that of the plaintiff's wife, the evidence of the plaintiff's wife was entirely absurd and opposed to all the probabilities of the case, as gathered from the evidence.

4. That no action would lie in this case even if the distress warrant had been issued for more rent than was due.

Per TUCK, J., that from all the evidence it appeared that rent was in arrear to the amount of $85.15; that the goods were distrained on the premises; and that they were then removed to the plaintiff's barn against the will of the bailiff; and therefore this appeal should be allowed.

George F. Gregory, for the plaintiff.

G. G. Gilbert, Q.C., for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

CANADIAN PACIFIC RAILWAY COMPANY v. MUNICIPALITY OF CORNWALLIS.

Assessment and taxes—Recovery of taxes paid under protest—Liability of agent to refund—Exemption of lands—"Sold or occupied."

Action to recover moneys paid to the defendants, under protest, to redeem lands sold by the defendants for arrears of taxes, alleged to be due on the lands.

By the contract between the Government of Canada and the plaintiffs, upon the completion of any portion of the railway not less than twenty miles in length, the plaintiffs were to receive a grant of certain lands. It had been proved that the plaintiffs had earned the lands though they had not received any patent therefor.

Held, that the company were entitled to the land, and to be considered as the owners.

The contract provided that the lands of the company in the N. W. T. " until they are either sold or occupied shall also be free from such taxation for twenty years after the grant thereof from the Crown." The lands subsequently became part of the Province of Manitoba.

Held, following *Canadian Pacific R. W. Co.* v. *Burnett*, 5 Man. L. R. 395, that the lands had not been sold or occupied; and were exempt from the date of the contract, and for the period of twenty years after the issue of the patent, unless sold or occupied.

Held, also, that the money was paid under protest, and not voluntarily, and could be recovered back in the present action; and although the defendants were merely agents to collect part of the moneys, they were liable to refund.

Held, also, that the danger of a tax deed or certificate being issued and registered, creating a cloud on the plaintiffs' title, was sufficient pressure to render the payment made to prevent it, not a voluntary payment.

Per KILLAM, J., dissenting, that it was not intended that the company should have any recognizable vested interest in the lands until actually granted by the Crown; that the statute clearly did not of itself vest in the company, or the contractors, any legal estate or interest in the land, either at once or upon completion of sections of the road; that the exemption was to be for a period of twenty years running from the Crown grant; that there did not appear any clear evidence of a strict fulfilment, or of the time of fulfilment of the contract, to entitle the company to a grant.

Ewart, Q.C., *Tupper*, Q.C., and *Phippen*, for the plaintiffs.

Martin, A.-G., for the defendants.

WATEROUS ENGINE WORKS CO. v. JONES.

Guaranty—Action on—Covenantee not named—Evidence of surrounding circumstances.

Action for moneys due on a guaranty given by the defendant under seal, as follows:—"I, J.P.J., hereby agree to become responsible for the debt contracted by J.J. to the W. E. W. Co., the said debt being the past due notes and account and interest due on * * * purchased by him J.J. and C.N. under the terms and conditions of their, the said W. E. W. Co.'s, contract and agreement, all of which terms and conditions I hereby agree to abide by."

At the trial KILLAM, J., entered a verdict for the defendant, holding that it did not appear from the above writing that the plaintiffs were the covenantees, or the parties to the contract to whom the promise was made, and that therefore the writing did not satisfy the Statute of Frauds. The plaintiffs appealed.

Held, that the verdict entered for the defendant should be set aside, and a verdict entered for the plaintiffs; that the plaintiffs were named in the instrument, and without doing violence to the rules of construction it might be read to mean that the defendant agreed to become responsible to them for the indebtedness mentioned. Evidence of surrounding circumstances will be looked at in the case of guaranties, as well as in the case of other written instruments, to enable the Court to ascertain the meaning that an ambiguously worded instrument was intended to bear.

Ewart, Q.C., and *McPhillips*, for the plaintiffs.

Culver, Q.C., and *Cooper*, for the defendant.

[TAYLOR, C.J.

In re ALLAN.

Real Property Act—Tax sale—Service of notices on former owners.

Reference by the District Registrar at Portage la Prairie under s. 120 of the Real Property Act of 1889, for an opinion and di-

rection as to further proceedings. In April, 1888, lands were sold by the municipality of St. Laurent for arrears of taxes, and purchased by the municipality. The certificate was assigned to one Nanton, to whom a deed was issued, at the expiration of the period allowed for redemption. The amount for which the sale and assignment was made to Nanton was greater than that for which the municipality had purchased. The applicant held a conveyance from Nanton. No interest was charged upon the taxes. The applicant contended that he was entitled to receive from the District Registrar notices as provided by the 57th section of the Real Property Act of 1889, to be served upon all persons who, except for such tax deed, would have been interested in the lands.

The opinion of a Judge was requested as to whether the tax deed was validly issued, and, if so, whether it came within the provisions of s. 673 of the Manitoba Municipal Act, 1886, as amended, or s. 155 of the Assessment Act; and a direction as to whether the District Registrar ought under the circumstances to permit the service of such notices.

Held, that s. 155 of the Assessment Act did not affect the case, as the sale was held while the Municipal Act of 1886 was in force.

That the purchaser of a tax certificate is an assignee of the municipality, the purchaser at the tax sale, and, under the terms of s. 671 of the Municipality Act, 1886, entitled to demand and receive a deed, which, when issued to him, would have the same effect as a tax deed issued to the assignee of any other purchaser at a tax sale.

That the applicant was entitled to receive notices for service upon the persons appearing to be the persons who would have been interested in the lands, except for the tax deed.

Coulter, for the applicant.

DOWNS v. CAMPBELL.

Real Property Act—Allegations in petition—Caveat.

Application under the Real Property Act. An objection was taken to the petition because it contained no allegation that the

caveat filed with the District Registrar was supported by an affidavit or statutory declaration as required by the Real Property Act, 1889, s. 130, s-s. 8. It did allege that, on a day named, "the caveator filed a caveat in the prescribed form."

Held, sufficient. The Act requires such an affidavit, and where there is such an allegation as is found here, it may properly be assumed, in the absence of evidence to the contrary, that the requirements of the Act have been complied with.

[BAIN, J.

ROWAND v. MARTIN.

Arbitration and award—Setting aside award—Employment of arbitrator previous to arbitration—Railway Act, 1881—Interpretation of s. 31.

Bill to set aside an award fixing the amount to be paid to the plaintiff as compensation for lands taken by the defendant, the railway commissioner for the Province of Manitoba; on the ground of partiality and misconduct on the part of the arbitrator appointed by the railway commissioner, and the third arbitrator. C., the third arbitrator or umpire, was employed by the railway commissioner shortly before the arbitration proceedings commenced to value six other lots in the same neighbourhood as the plaintiff's land and was paid by the railway commissioner for such valuation. The solicitor for the railway commissioner handed the plaintiff's solicitor a list of the names of several persons, any one of whom he suggested as suitable for the position of third arbitrator. C.'s name was on the list. The plaintiff did not know till after the arbitration was finished that C. had been employed by the railway commissioner. The sum awarded was $200, the same amount as that offered to the plaintiff, which he had refused.

Held, that the award must be declared null and void and must be set aside, with costs against the railway commissioner, on the ground that C.'s employment by the defendant, the railway commissioner, would naturally have tended to bias his judgment.

The railway Act, 44 V. c. 27, s. 31 (Man.), provides that, "The surveyor or other person offered or appointed as valuator or arbitrator shall not be disqualified by reason that he is professionally employed by either party, or that he has previously expressed an opinion as to the amount of compensation," &c.

Held, that this section did not apply to a third arbitrator or umpire, but only to the arbitrator or valuator appointed by the parties.

Culver, Q.C., and *Kennedy*, Q.C., for the plaintiff.

Cameron and *Mathers*, for the railway commissioner.

Exchequer Court of Canada.

[BURBIDGE, J., 4TH NOVEMBER, 1890.

ST. CATHARINES MILLING AND LUMBER CO. v. REGINAM.

Dominion lands—Permit to cut timber—Implied warranty of title—Breach of contract to issue license.

A permit issued under the authority of the Minister of the Interior, under which the purchaser has the right within a year to cut from the Crown domain a million feet of lumber, is a contract for the sale of personal chattels, and such a sale ordinarily implies a warranty of title on the part of the vendor; but if it appears from the facts and circumstances that the vendor did not intend to assert ownership but only to transfer such interest as he had in the thing sold, there is no warranty..

The Government of Canada by order-in-council authorized the issue of the usual license to the suppliants to cut timber upon the Crown domain, upon certain conditions therein mentioned. The suppliants did not comply with such conditions, but before the expiry of the year during which such license might have been taken out, proceedings were commenced by the Government of Ontario against the suppliants, under which it was claimed that the title to the lands covered by the license was vested in the Crown for the use of the Province of Ontario, and that contention was ultimately sustained by the Court of last resort.

Held, that there was a failure of consideration which entitled the suppliants to recover the ground rent paid in advance on the Government's promise to issue such license.

Quære:—Will an action by petition or on reference lie in the Exchequer Court against the Crown for unliquidated damages for breach of warranty implied in a sale of personal chattels?

McCarthy, Q.C., and *A. Ferguson*, Q.C., for the suppliants.
Robinson, Q.C., and *Hogg*, Q,C., for the Crown.

[17TH NOVEMBER, 1890.

VACUUM OIL COMPANY v. REGINAM.

Revenue—Customs duties—The Customs Act, 1883, ss. 68, 69, 198, 207—Money deposited in lieu of seizure—"Market value"—Waiver of notice of claim—Penalties—Prescription.

The suppliants were manufacturers of oils doing business at Rochester, New York. Their principal business in the United States was done directly with the consumer. For several years they did business from their office at Rochester directly with Canadian consumers. In some cases the purchaser paid the duty, and in others the suppliants sold at a price including the duty and the cost of transportation. In the former case they charged the Canadian purchaser the price to consumers at their place of business in Rochester, and the oils were so invoiced and the duty paid on that value by the purchaser. In the latter case the price to the consumer at Rochester was taken as a basis upon which the price per gallon to the Canadian purchaser was made up, but the goods were entered for duty at a lower value,—two sets of invoices being used, one for the purchaser in Canada, and the other for the suppliants' broker at the port of entry.

Held, that the oils were undervalued.

The suppliants, having changed their manner of doing business in Canada, and having established a warehouse at Montreal, which became the centre and distributing point of their Canadian business, exported oils from Rochester to Montreal in wholesale lots. The invoices showed a price which was not below the fair market value of such oils when sold at wholesale for home consumption in the principal markets of the United States.

Held, that there was no undervaluation.

When goods are procured by purchase in the ordinary course of business and not under any exceptional circumstances, an

invoice disclosing truly the transaction affords the best evidence of the value of such goods for duty. In such a case the cost to him who buys the goods abroad is, as a general rule, assumed to indicate the actual market value thereof. It is presumed that he buys at the ordinary market value. It is not the value at the manufactory, or the place of production, but the value in the principal markets of the country, *i. e.*, the price there paid by consumers or dealers to dealers that should govern. Such value for duty must be ascertained by reference to the fair market value of such or like goods when sold in like quantity or condition for home consumption in the principal markets of the country whence so imported.

Goods seized for fraudulent undervaluation were released upon a deposit of money. The importer made no claim by notice in writing under s. 198 of The Customs Act, 1883, but there was no question that he claimed the goods. Subsequently he submitted evidence to show there was no ground for the seizure, and the Minister having considered such evidence, and having heard the parties, acquitted the importer of the charge of fraudulent undervaluation, but found there had been an undervaluation of these and other goods. No proceedings were taken to condemn the goods within the three years mentioned in s. 207 of The Customs Act, 1883. On petition to recover the money deposit, it was

Held, that the Minister had waived the notice of claim required by section 198 of the said Act.

Quære:—Does s. 198 apply to the case where money is deposited in lieu of goods seized?

The additional duty of fifty per cent. on the true duty payable for undervaluation under s. 102 of the Customs Act, 1883, is a debt due to Her Majesty which is not barred by the three years prescription contained in s. 207, but may be recovered at any time in a Court of competent jurisdiction.

Quære:—Is such additional duty a penalty?

Gormully, Q.C., *H. Abbott*, Q.C., and *Campbell*, for the suppliants.

Osler, Q.C., and *Hogg*, Q.C., for the Crown.

ONTARIO.

High Court of Justice.

CHANCERY DIVISION.

[The Divisional Court, 9th September, 1890.

TOWN OF THOROLD v. NEELON.

Company—Liability to contribute—Fully paid up shares—Notice—Allowance of discount.

A railway company agreed to transfer to N., a director, a certain number of fully paid up shares as security for payment of a loan of $100,000 then made by N. to the company, and afterwards did transfer to him what purported to be fully paid up shares to the number stipulated.

An execution creditor, with writs of *fi. fa.* returned *nulla bona*, now brought this action against N., alleging the shares not to be fully paid up, but that a sufficient sum remained due thereon to cover his judgment, and asking for an order against N. for payment accordingly.

It appeared that 75 of the shares had formerly been part of a block of 168 shares held by D. B., who had paid in all $3,750 to the company, which represented the par value of 75 shares. The directors resolved to treat the $3,750 accordingly as payment in full of 75 of the 168 shares, and then got D. B. to transfer these 75 shares to N. in part compliance with their agreement with him. As to the balance of the shares transferred to N. it appeared that a discount had been allowed upon them, but N. had no knowledge of this fact.

Held, that the shares must be considered as fully paid up in the hands of N.

H. H. Collier, for the plaintiffs.

W. Cassels, Q.C., for the defendant.

[BOYD, C., 1ST NOVEMBER, 1890.

In re GRAYDON AND HAMMILL.

Vendor and purchaser—Contract of sale of land—Incumbrances—Local improvement rate—Sewers.

Where parties had contracted in writing, the one with the other, to sell to each other certain lands free from incumbrances,

Held, that, though the contract also provided that taxes were to be proportioned and allowed to date of completion of sale, special frontage rates imposed for local improvements and construction of sewers prior to the contract, the period of which had not expired, were incumbrances to be discharged by the vendors respectively.

A. Cassels, for Graydon.

Marsh, Q.C., for Hammill.

[FERGUSON, J., 4TH OCTOBER, 1890.

SMITH v. TENNANT.

Sale of land—Contract—Conveyance—Merger of contract in conveyance.

The plaintiff agreed in writing to give certain lands of his for five houses of a person for whom the defendant was assignee for creditors, which were in course of erection on S. avenue. By the contract, which was dated 24th March, these five houses were to be completed by 30th May, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties within 60 days, *i.e.*, by 24th May, and as a matter of fact they were executed and exchanged about 9th May.

The plaintiff claimed damages for non-completion of and defects in the finishing of the five houses on S. avenue.

The deed from the defendant contained no covenants covering the matters complained of.

Held, that, nevertheless, the plaintiff was on the original contract entitled to recover.

It was impossible to arrive fairly at the conclusion that a contract to perform certain work or to do a certain thing for the benefit of the other contracting party at a period after the time

fixed by the same agreement for the execution and final delivery of the formal conveyances, became merged in the conveyance.

T. W. Howard, for the plaintiff.

Moss, Q.C., and *R. A. Dickson*, for the defendant.

[18TH NOVEMBER, 1890.

SMITH v. BROWN.

Mortgagor and mortgagee—Sale under power—Notice of sale—Demand of payment within a month—Advertising sale during the month—Injunction—R. S. O. c. 102, s. 30.

An advertisement for sale of lands is a "proceeding" within the meaning of the words "no further proceedings" in s. 30 of R. S. O. c. 102.

Where a mortgagee served upon the mortgagor a notice demanding payment of the mortgage money and stating that unless payment were made within a month from the service, the mortgagee would proceed to sell, an injunction was granted restraining the mortgagee from publishing until after the expiry of the month an advertisement of the sale of the mortgaged premises.

A. Abbott, for the plaintiff.

J. A. Paterson, for the defendants.

[ROSE, J., 8TH NOVEMBER, 1890.

HALL v. HALL.

Donatio mortis causâ—Delivery of keys of box and rooms containing valuables.

Shortly before his death the plaintiff's uncle delivered to her his watch and pocket-book, and also the keys of his cash box, then in the actual possession of his solicitor, and of two rooms, in which were contained securities for money and chattels. He accompanied the delivery with words of gift.

Held, upon the evidence, that the deceased intended to give to the plaintiff what the keys placed in her control, and to part with the possession and dominion of the cash box and its contents and of the rooms and their contents; and, upon the law, that the intention of the deceased should be given effect to, and a valid *donatio mortis causa* declared.

C. G. Snider, for the plaintiff.

Bicknell, for the defendants.

[ROBERTSON, J., 12TH SEPTEMBER, 1890.

In re COLLINGWOOD DRY DOCK CO.

WEDDELL'S CASE.

Company—Winding-up proceedings—Statements as to shares in petition of incorporation—Liability to contribute.

In winding-up proceedings of the above company it appeared that W. had in the petition for incorporation declared that he had taken 250 shares of the capital stock of the company.

Held, that, bearing in mind the provisions of the Ontario Joint Stock Companies' Letters Patent Act, R. S. O. c. 157, s. 7, s-ss. 2, 3, 4; ss. 13, 30, 43, W. was liable to be held as a contributory to the amount of these shares.

The general scope of the Act shows that it was intention of the legislature to compel persons who lend their names to establish a company to be really substantially liable, and not to allow them to hold out their names as the promoters, and at the same time to incur no obligation.

W. H. P. Clement, for Weddell.

J. M. Clark, for the liquidator.

IN CHAMBERS.

[BOYD, C., 4TH NOVEMBER, 1890.

In re ANCIENT ORDER OF FORESTERS AND CASTNER.

Security for costs—Interpleader.

Security for costs may be ordered in interpleader proceedings.

Swain v. *Stoddart*, 12 P.R. 490, approved and followed.

Belmonte v. *Aynard*, 4 C.P.D. 221, 352, distinguished.

The party substantially and in fact moving the proceedings, whether plaintiff or defendant in the interpleader issue, should, if resident out of the jurisdiction, give security to the opposite party.

A. G. Chisholm, for the claimant Castner.

Hellmuth, for the claimant Kershner.

[7TH NOVEMBER, 1890.

BICKERTON v. DAKIN.

Mechanics' lien—Partnership—Claim of lien registered in name of, after dissolution—"Claimant"—"Person entitled to the lien"—53 V. c. 37—Jurisdiction of High Court—Joining liens—Statement of claim under 53 V. c. 37, s. 2—Amendment.

A claim of lien under the Mechanics' Lien Act was registered and proceedings to enforce it were taken in the name of a firm which had been dissolved and one of the members of which had died prior to the registration. The materials for which the lien was claimed were, however, all furnished by the firm before the dissolution or death, and it was provided that the dissolution was not to affect this and other engagements.

S. 16 of R. S. O. c. 126, under which the lien was registered, speaks of the "claimant" of the lien, and s. 19 of the "person entitled to the lien." The Interpretation Act, R. S. O. c. 1, s. 8 (18), shows what the word "person" shall include, and does not mention a "firm" or "partnership."

Held, that the lien attached on the land and was validly continued; the difficulty as to the word "person" was overcome by the use of the alternative word "claimant," which extended to a partnership using the firm name in the registration of the lien.

Under the Act to simplify the Procedure for enforcing Mechanics' Liens, 53 V. c. 37, it is competent to join liens so as to give jurisdiction to the High Court, though each apart may be within the competence of an inferior Court.

The plaintiffs in proceeding under 53 V. c. 37 to enforce their lien filed with a Master as the "statement of claim" mentioned in s. 2, a copy of the claim of lien and affidavit registered, verified by an affidavit, and the Master thereupon issued his certificate.

Held, that if the "statement of claim" filed was not in proper form, inasmuch as it contained all the facts required for compliance with the Act, an amendment *nunc pro tunc* should be allowed.

Masten, for the plaintiffs.

Aylesworth, Q.C., for the defendant Nesbitt.

[FERGUSON, J., 4TH SEPTEMBER, 1890.

SECORD v. TRUMM.

Mechanics' liens—Act to simplify the Procedure for enforcing Mechanics' Liens, 53 V. c. 37—Scope of Act—Procedure.

Held, that notwithstanding the apparently unlimited provisions of s. 1 of 53 V., c. 37, entitled "An Act to simplify the Procedure for enforcing Mechanics' Liens," a perusal of the whole Act leads fairly to the conclusion that the intention of the legislature in passing it was to simplify procedure in the High Court only for enforcing mechanics' liens, leaving the summary and simple procedure for that purpose before fully provided for in County Courts and Division Courts, unaffected by the passing of the Act.

R. G. Cox, for the defendant.

Aylesworth, Q.C., for the plaintiff.

[THE MASTER IN CHAMBERS, 5TH NOVEMBER, 1890.

GRÆME v. GLOBE PRINTING CO.

Evidence—Admissibility—Witness under sentence of death.

This was an action for libel growing out of a newspaper article published by the defendants in which, as the plaintiff charged, it was asserted that he was in some way connected with the murder of one Benwell. The article appeared subsequent to the trial and conviction of one Birchall for the murder of Benwell, and Birchall was at the time in goal under sentence of death.

The plaintiff desired to obtain the evidence of Birchall to establish that he (Birchall) had not said that the plaintiff was in any way connected with the murder of Benwell. The sentence of death was to be executed on Birchall on the 14th November, 1890.

On the 4th November, 1890, the plaintiff moved before the Master in Chambers for an order to examine Birchall as a witness in the case and to use his depositions at the trial, which would not take place in the ordinary course till after his death.

Langton, Q.C., for the defendants, contended, *inter alia*, that Birchall was civilly dead and was not a competent witness, and

therefore that the order should not be made, citing *Regina* v. *Webb*, 11 Cox 133.

Hilton, for the plaintiff, contended that all disabilities of witnesses are now removed by ss. 2 and 3 of the Evidence Act, R. S. O. c. 61 (which sections are substantially the same as the first section of the Act 6 & 7 V. c. 85), and referred to Taylor on Evidence, Bl. ed., s. 1347, note 2.

THE MASTER IN CHAMBERS held, following *Regina* v. *Webb*, that Birchall, being a person under sentence of death, was not a competent witness, and refused to make the order.

On an appeal argued by the same counsel :—

GALT, C.J., upheld the Master's order, but upon other grounds.

Note.—In *Regina* v. *Gregorio Mogni*, reported in the London *Daily Times* of the 3rd March, 1865, an indictment for manslaughter, BYLES, J., admitted the evidence of Serafino Pelizzioni, a Crown witness, who was at the time a prisoner in Newgate under sentence of death. Mogni was found guilty and sentenced to five years' penal servitude.

In the County Court of York.

[McDOUGALL, Co. J., 5TH NOVEMBER, 1890.

SMITH v. ANTIPITZKY.

Costs—Lien of execution creditor for, under R. S. O. c. 124, s. 9—Seizure by sheriff prior to assignment for benefit of creditors—Possession money—Poundage.

A sheriff seized the defendant's goods under an execution, and while he was in possession the defendant made an assignment for the benefit of creditors. The assignee demanded possession of the goods, but the sheriff refused to deliver them up until the costs of the execution creditor and his own fees were first paid, and remained in possession for some days after receiving notice of the assignment.

Held, that the sheriff was not bound to give up possession until the lien of the execution creditor created by R. S. O. c. 124, s. 9, was satisfied; and therefore he was entitled to possession money down to the date of payment to the execution creditor; and also to poundage, or to a reasonable sum in addition to his fees for possession, equivalent to the amount he would have been entitled to retain had he proceeded to a sale and realized the amount of the execution and his own fees.

This was an application by the sheriff of Toronto to have determined the rights and priorities of himself, the plaintiff, and

the assignee of the defendant for the benefit of creditors, under the circumstances shewn in the judgment.

R. J. Maclennan, for the sheriff.

T. W. Howard, for the plaintiff.

J. W. Curry, for the assignee.

McDOUGALL, Co. J.—In this case the plaintiff, having obtained a judgment and execution against the defendant, placed the same in the hands of the sheriff of the city of Toronto. The sheriff made a general seizure of the defendant's goods thereunder, and found sufficient goods to realize the full amount of the judgment debt and costs, including his own fees. While he was yet in possession the defendant made an assignment to an assignee for the benefit of creditors. The assignee notified the sheriff and requested him to give up possession of the goods seized to him, the assignee. The sheriff, acting on the directions of the execution plaintiff, refused to deliver up the goods until the amount of the plaintiff's costs and his, the sheriff's, fees were first paid, and remained in possession for some days after receiving notice of the assignment. The assignee informed the sheriff that he would treat the plaintiff's costs and the sheriff's fees up to the date of notice of the assignment as a first charge upon the proceeds of the sale of the goods, after deducting the amount of the costs of the assignment, and the costs of sale. This offer was declined and an application was made to me on behalf of the sheriff to determine the rights and priorities of all parties in the premises. Meanwhile the assignee effected a sale of the goods *en bloc* for a sum sufficient to pay all the costs in dispute, including his own, and upon the return of the motion before me, acting upon my suggestion, the plaintiff's costs of recovering judgment and the sheriff's fees other than poundage and the disputed possession money were paid over, and the question of the sheriff's right to possession money down to the day on which the motion was returnable and his right to poundage was to be determined by me, it being agreed that sufficient money to meet the same if allowed and costs of the motion would be retained by the assignee. The sheriff thereupon gave up possession to the assignee.

S. 9 of c. 124, R. S. O., reads as follows:—"An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution

creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands."

The execution of the plaintiff was the only execution in the sheriff's hands.

I think that the expression "subject to the lien" must be interpreted liberally and in favour of the execution creditor who answers the description and definition in the statute. The ordinary definition of a lien is the right to hold the possession of goods or property to the exclusion of the owner's possession without divesting his title as owner. It confers no right of sale. Under the provisions of this Act a debtor may assign to any one; and though it is true any such assignee becomes subject to the general control of the Court and may be removed by the Court for cause, still he is not an officer of the Court in the sense that the sheriff is, or as were the official assignees under the repealed Insolvent Act. It would be manifestly unjust, especially where the estate is small, and the costs in respect of which the statutory lien is created are large, that the execution creditor who is in possession should be compelled to withdraw and look to a stranger to realize and pay his lien. It is contrary to the analogy existing in many other cases. A landlord in possession for rent cannot be compelled to give up the goods seized, to a sheriff with an execution, till his claim is paid.

A Division Court bailiff by express enactment relating to this very Act, R. S. O. c. 124 and to this s. 9, must have his fees paid into Court before he is compelled to give up his possession to the assignee: 52 V. c. 12, s. 2.

It has been held that the lien created by s. 9 covers the plaintiff's costs as well as the sheriff's fees: *Clarkson* v. *Ryan*, 16 A. R. 815. I am of opinion therefore that the sheriff was not bound to give up possession of the goods seized in this case until the lien created by the statute was satisfied. This conclusion, if right, disposes of another of the points I was to determine. If the sheriff was not bound to hand over possession to the assignee till the lien was paid, he is entitled to his possession money down to the date of payment.

The sheriff is also entitled in my opinion to his poundage, or to a reasonable sum in addition to his fees for possession. I think his claim comes directly within the provisions of Consolidated Rule 1233. In this case, as it is admitted that the goods

seized were sufficient in value to have satisfied the full amount of the execution creditor's claim, including the sheriff's fees and poundage, I see no reason for naming any less sum to be paid the sheriff than the amount he would have been entitled to retain had he not been interfered with, and proceeded to a sale and realized the amount of the execution and his own fees.

I shall allow the sheriff and execution creditor their costs of this motion.

In the County Court of Ontario.

[DARTNELL, JUN. Co. J., 15TH NOVEMBER, 1890.

In re CURTIN AND TAYLOR.

Costs—Fees to surveyor for map and survey—Ditches and Watercourses Act—Division Court costs.

The appellant, Curtin, having succeeded in setting aside the award of a township engineer under the Ditches and Watercourses Act, with costs against the respondent, Taylor, filed the usual affidavit of disbursements and claimed therein $17 as paid to a surveyor for a map and survey, in addition to his fees as a professional witness. The clerk disallowed this charge, and Curtin appealed from his ruling.

N. F. Paterson, Q.C., for the appellant.

Chapple, for the respondent.

DARTNELL, JUN. Co. J.—The clerk is right. S. 27 of the Ditches and Watercourses Act, R. S. O. c. 220, provides that "the fees to witnesses * * * shall be the same as those allowed to witnesses * * * in the Division Court." It is true that in the Superior and County Courts, by Rule 1213, the taxing officer can allow for maps or plans when the necessity of them is shewn to him and that they were used at the trial; but this Rule cannot be taken as adding another item to the Division Court tariff. In this, as well as in similar cases before me under the Act, the map was unnecessarily elaborate and expensive. Appeal dismissed.

In re HEALY AND McDONALD.

Water and watercourses—Ditches and Watercourses Act—Maintaining ditches—Benefit to the lands—Inferior and superior owners.

This was an appeal by Healy from the award of a township engineer under the Ditches and Watercourses Act.

Through Healy's land from east to west was situated a well defined natural drain or watercourse. McDonald's land lay to the south, and in order to drain a portion thereof it became necessary to open a ditch northerly through Healy's land until the natural watercourse was reached. This, by an award of the township engineer made in 1884, was permitted to be done by McDonald at his own expense. A new award by a different engineer directed that the ditch should in future be deepened and maintained by Healy. The appeal was from this award.

N. F. Paterson, Q.C., for the appellant.

McCosh, for the respondent.

DARTNELL, JUN. Co. J.—The award in question is, in fact, a reversal award in a matter of considerable importance to the appellant. There do not appear to be any new circumstances which would justify the changes, and certainly none enuring to his benefit. On the contrary, from the raising of the waters of Lake Simcoe, more than the usual quantity of water backs up on Healy's land, and the additional volume of water from McDonald's land would tend further to increase the flooding. There was some evidence that the drain in question might benefit a small portion of Healy's land; but, on the other side, it was shewn that by reason of its zig-zag course, it would inconveniently divide the land through which it passes. It is to be recollected that the Act is in derogation of common law rights, and it must therefore not be construed to the detriment of one who but for its operation has no obligation imposed upon him.

The construction or maintenance of a ditch or drain for the benefit of another should not be imposed upon any one unless a decided and preponderating benefit is the natural consequence. I think it is the duty of the engineer to weigh the disadvantages against the advantages, and only charge a duty upon an unwilling owner when he is clearly and considerably to be benefited by the work. The present award is, in fact, a reversal of that made by the former engineer, and I am fortified by his opinion. I can

find no circumstances which justify any change, but rather the contrary. This award must be amended by restoring the parties to the position they formerly occupied, and the appeal is allowed with costs.

In the County Court of Elgin.

[HUGHES, Co. J., 26TH AUGUST, 1890.

In re PARKER.

Extradition—Powers of County Court Judge—Committal for extradition after discharge of prisoner under habeas corpus.

The jurisdiction of a County Court Judge under the Extradition Act is limited only by the bounds of the province, and not by those of his county.

An Extradition Judge has power to enquire into a charge and commit a person for extradition to a foreign country after a previous inquiry and committal by another Judge and the discharge of the prisoner under *habeas corpus*.

John Wesley Parker was committed by the Junior Judge of the County Court of the county of Middlesex for extradition to the United States of America, for forgery committed in the State of Kansas; but was afterwards brought upon *habeas corpus* before ROSE, J., who ordered his discharge. See 19 O. R. 612. The Judges of the County Court of Middlesex refused to allow any other proceeding to be taken against Parker.

Subsequently the Judge of the County Court of the county of Elgin issued his warrant under the Extradition Act and the prisoner was brought before him for extradition upon the same charge, and fresh evidence was adduced.

Objection was then taken to the jurisdiction of the Judge on the grounds that the prisoner had already been charged with the same crime; that he had been discharged under the Habeas Corpus Act, and was not subject to re-arrest; that the case belonged to the county of Middlesex; and on other grounds.

McKillop, for the prosecution.

R. M. Meredith, for the prisoner.

HUGHES, Co. J.—I think the case of *Arscott* v. *Lilley*, 11 O. R. 153, fully justifies the course I took by issuing the warrant which initiated these proceedings; and I would say, in the first

place, that the existing Extradition Treaty, between Her Majesty the Queen of Great Britain and the United States of America, and the Extradition Act, were of international import and design; all made and passed subsequent to any Imperial or Canadian statute; and by their provisions I am to be governed in this matter; and whilst it is true the proceedings before me are in their mode to be governed according to our criminal procedure before justices of the peace, as far as possible, still, I have a right to consider myself as "the other Court having jurisdiction of the cause" within the meaning of the 6th section of the Habeas Corpus Act, 31 Car. II c. 2, supposing that Act were applicable, because all Judges of the Superior Courts and of the County Courts are authorized to act judicially in matters under the Extradition Act within this Province, and they have, for the purposes of the Act, all the powers and jurisdiction of any Judge of the Province. * * * * *

The Extradition Judge is the only authority having power in this Province to inaugurate proceedings under the treaty. His acts are ancillary to the proper and legal exercise of jurisdiction over the accused and the offences alleged against him, by the foreign tribunal alone competent to deal with them; so that whatever acts, whether judicial or magisterial, here are necessary, are ancillary to and in aid of the Court in the country where the alleged offence was committed, and whence the accused has fled; for without his intervention the foreign tribunal would be shorn of its power to do justice in the case.

In view of the objection to my jurisdiction in this matter, I must observe, *first*, that under the 5th section of the Act it is co-extensive with that of the Judges of the Superior Courts, and limited only by the bounds of the Province, and not by those of the county of Elgin, and every County Judge has for the purposes of the Act all powers and jurisdiction of any Judge or magistrate of the Province.

Second, I observe that it is not a bar to my acting in the case that the prisoner has been discharged by *habeas corpus* since I issued the warrant against him under the Extradition Act.

I am unable to suppose that if this had been an accusation of *murder* committed in the State of Kansas, instead of forgery, the provisions of the treaty would be set aside or governed or controlled by our local or domestic laws affecting the liberty of the subject, merely because the accused had been discharged

either by an Extradition Judge or upon a writ of *habeas corpus* for some or any defect in the proceedings, in this country; either that the person who issued the first warrant had no jurisdiction, or that there was some defect in the preliminary proof or proceedings, or that the warrant or order upon which he stood committed was invalid, or that the person had purged away the offence or the crime by a failure in proof upon the preliminary inquiry, or that the discharge upon the *habeas corpus* is a bar to any subsequent arrest.

The principle contended for by counsel here, "*Nemo bis vexari pro una et eadem causa*," can only be held to have application where there has been a trial, and a final conviction or acquittal upon that trial; or where there has been an accusation in one form of indictment disposed of by a legal termination and the person is accused by another forum on the same facts, or where a statute provides a bar to further proceedings.

My acting in this capacity under the treaty and the Extradition Act is simply and purely ancillary, in aid of the foreign Court to which jurisdiction of trying this prisoner and pronouncing upon the crimes alleged against him belongs. There is no power to try either the offences or the offender here, and a murderer or a convict for any crime named in or covered by the treaty (according to my judgment) does not purge his crime by a discharge upon *habeas corpus*. It would be contrary to the polity of the governments who are parties to the treaty and of international law. We might harbour malefactors to any extent if such were held to be the case, contrary to the comity and object of the treaty. I hold that the treaty being of international arrangement and concern, it must be upheld and carried out to all reasonable intendment, and that it overrides all previously existing domestic laws to the contrary.

Although it is true the practice under the treaty is governed by our mode of conducting preliminary inquiries, *as a matter of procedure*, still the principle which applies to cases submitted to a grand jury in this country, where if a bill of indictment be ignored in a charge for a criminal offence—upon which a prisoner is confined in gaol—there is nothing (although he be discharged from custody) in the fact of ignoring the bill, to prevent the accusation being taken up, on a subsequent occasion, by another grand jury, at some future sittings of a Court of competent jurisdiction, and a bill of indictment being found for the

same offence. The ignoring of the bill on the first indictment and the discharge of the accused from gaol is no bar to the second accusation—nor would it purge the offence in any way.

The statute of Charles does not apply to a person accused of a crime committed in a foreign country; it only applies to cases of commitment on a criminal charge for an offence against the domestic law of the country. Nothing could justify the arrest of a foreigner, who has sought an asylum here, as a fugitive from foreign justice, for a criminal offence alleged to have been committed abroad, in the absence of a treaty justifying such a proceeding. In *Rex* v. *Mackintosh*, 1 Stra. 308, it was held that the statute of Charles did not apply to a person committed for treason done in Scotland, because the Courts will not act under the statute in the case of a person charged with a crime committed abroad.

Under the existing treaty with the United States, and the Extradition Act, the Judges who perform judicial acts ancillary to the tribunals of the United States, within the convention, must be treated as should those tribunals themselves, in order to promote the purposes for which those tribunals exist,—their acts are in the interest of promoting civilization, by the detection, prevention, and punishment of crime, and to hold that the former discharge upon *habeas corpus* by a single Judge would be to oust the foreign tribunal of its jurisdiction over the offence; or to suppose that the domestic law of this Province would allow a fugitive from a foreign land who has sought an asylum here to purge his offence committed in the foreign land, no matter how heinous it might be, would be to turn the treaty into a failure and a delusion * * * and it is not the policy of the high contracting parties to the existing treaty that the criminals of either country should be *covert* or *couchant* in the other country.

[The learned Judge then considered and overruled certain objections to the evidence given before him, and concluded, after discussing the evidence on the merits, by ordering that the prisoner should be committed to gaol to remain until surrendered to the State of Kansas or to the United States of America or until discharged according to law.]

NEW BRUNSWICK.

In the Supreme Court.

[31st October, 1890.

TURNER v. READ.

Costs—Pleadings—Demurrer to one plea with leave to plead over—Judgment on demurrer for defendant—Issues of fact for plaintiff—C. S. c. 37, s. 208.

An application to review the taxation of costs.

The plaintiffs joined issue on all the pleas of the defendant and also by leave of a Judge demurred to the fifth plea. Judgment was given for the defendant on the demurrer. The issues in fact were afterwards tried and were all found in favour of the plaintiffs, and an application for a new trial refused. The defendant signed judgment for his costs on demurrer and claimed that the judgment in his favour on demurrer disposed of the whole cause of action and entitled him to the general costs of the cause.

Held, that the defendant was not entitled to the general costs of the cause, but only to the costs of the demurrer under s. 208, of C. S. c. 37.

Held, also, that the plaintiffs were entitled to the general costs of the cause, from which the costs taxed for the defendant on the demurrer should be deducted, and judgment signed for the balance.

Per Allen, C.J.—There can be but one judgment roll in a case, and it must shew the determination of all the issues and the award of costs taxed for the defendant. *McLaughlan* v. *Wilson*, 2 Kerr 626, shews the principle on which the judgment roll should be made up in such a case as this. *Read* v. *Botsford*, 4 Allen 476, will be a useful guide in making up the judgment roll in the present case. The rule should be made absolute without costs: (1) because it was not moved for with costs; (2) because it is not usual to give costs on applications to review the clerk's taxation; (3) because the point raised is a new one.

A. J. Gregory, for the plaintiffs.

F. St. John Bliss, for the defendant.

SAVOY v. SAVOY.

Will—Proof of before registrar of deeds—Subscribing witness—Certified copy —When admissible in evidence—C. S. c. 74, ss. 6, 15.

This was an action of ejectment. At the trial the plaintiff obtained a verdict. In order to make out his title the plaintiff put in evidence a certified copy by the registrar of deeds and wills of the will of V. S. This will has not been proved in the Probate Court but proof thereof had been made before the registrar of deeds and wills for the county, by the oath of L. R., one of the subscribing witnesses, which stated "that he was present and did see V. S., the testator therein named, sign the same in the joint presence of this deponent and B. S. the other subscribing witness thereto, as and for his last will and testament; and that the said B. S. and this deponent signed the same as such witnesses in the presence of the said testator and of each other, and that the said will was read over and explained to the said testator previous to the execution thereof by him as aforesaid."

A motion was now made for a new trial, and the principal ground relied upon was that a copy of the will was improperly received in evidence: (1) because there was no authority to register a will except by a certified copy of it from the Probate Court; (2) because if the will itself could be registered the proof of the execution of it was not sufficient; and (3) that a certified copy of the will by the registrar of deeds proved in such a manner was not admissible in evidence.

ALLEN, C.J.—The question in this case depends upon the construction to be given to the Con. Stat. c. 74, the fourth and fifth sections of which contain substantially the same provisions with regard to the time of registering wills as were contained in sections 5 and 6 of 10 V. c. 48, and the sixth section of c. 74 points out the persons who are authorized to take proof of the execution of any "conveyance." Con. Stat. c. 118, "Of the Interpretation of Terms," in paragraph 7 declares that the word "conveyance" shall mean any instrument by which any freehold or leasehold estate or interest in real estate may be transferred or affected. I think that it cannot be doubted that the words "any conveyance" in s. 6 of c. 74 may be read as "any will relating to real estate," and that the persons therein authorized to take proof of the execution of conveyances for

registry are authorized to take proof of wills for the like purpose. * * * I am of opinion therefore that there is power given by the sixth section of c. 74 to prove the execution of wills for the purpose of registry, and if the proof so given and certified on the will is sufficient that the will may be registered.

Assuming then that an original will may be registered, the next question is whether there was sufficient proof of the execution of it in this case as appearing by the certificate, to authorize the registry. * * * It was objected that the certificate in this case did not state that the writing was the last will and testament of V. S., and that he was dead. I do not think that these statements or either of them were necessary parts of the proof. If there is any defect in this proof it is in omitting to state that the testator appeared to the witness at the time he signed the will to be of sound and disposing mind and understanding, or some statement equivalent to that. In other respects I think the proof of the execution is quite sufficient. For the purpose of proof for registry I think it was not necessary for the witness to swear to the testamentary capacity of the testator at the time he signed the will. He has sworn to all that the fifth section of c. 74 requires. Of course the provisions of that section assume that the testator was capable of making a will and it prescribes the necessary forms for doing it. I do not wish to be understood as intimating that it is not necessary for a person claiming under a will to shew in some way the testamentary capacity of the testator if such objection be raised. How that is to be shewn will depend upon the circumstances of each case. It may in some cases be presumed: *Sutton* v. *Sadler*, 3 C. B. N. S. 87.

As to whether a certified copy of the will by the registrar of deeds was admissible in evidence to make out the plaintiff's title, there is no authority other than that contained in the 15th section of c. 74 for the admission of a certified copy of a will in evidence and as being prima facie evidence of its validity and due execution. Therefore unless a copy was receivable under that section it would seem that the rule as laid down by Chipman, C.J., in *Hamilton* v. *McLeod*, 2 Kerr 248, would still apply and that the original will must be produced and proved or if lost other sufficient evidence given of its contents and due execution. It is only where the will has been proved in the Probate Court and a certified copy of it registered in the office of the registrar

of deeds that a copy from the latter office can be received in evidence of the due execution of the will. I think, therefore, that the copy of the will was improperly received in evidence and that there should be a new trial on that ground.

FRASER and TUCK, JJ., concurred.

Blair, A.-G., for the plaintiff.

G. F. Gregory, for the defendant.

RYAN v. TURNER.

Elections—C. S. c. 5—Sheriff of county one of the sureties for petitioner—Effect of—Notice of trial set aside.

This case arose out of an election petition against the defendant, who had been returned as one of the members elected to represent the county of Albert in the House of Assembly at the general elections in January, 1890, and came before the Court on an application to set aside or vary an order made by TUCK, J., in June last, discharging a summons which he had granted calling upon the petitioner to shew cause why the notice of trial in this matter should not be set aside. The question to be determined was whether the sheriff of Albert, to whom the notice of trial was sent by the clerk of the pleas, was disqualified from publishing the notices as directed by statute, by reason of the sheriff being one of the sureties for the petitioner in this matter.

Held, that, as the sheriff is to select the public place in the parish in which the respondents reside in which he is to put the printed notices of trial, in doing so he is exercising his judgment, and his act is a judicial one, and equally so are his acts in selecting the part of the Court House and the place within the Registry office in which he will put the notice. Assuming that the posting of the notices are merely ministerial acts, the sheriff, who has a pecuniary interest in the result of the petition, cannot be presumed to be indifferent in posting such notices, and therefore even in that case he is disqualified from performing the act.

Per FRASER, J.—The public notice of trial of the election petition was not properly given, and the order of discharging the summons should be rescinded and such summons should be made absolute and the notice of trial set aside with costs.

Weldon, Q.C., for the petitioner.

H. A. Powell, for the respondents.

Ex Parte McELROY.

Canada Temperance Act—Third offence—Justice of the peace—Arrest on warrant after summons issued and evidence taken—Conviction good.

This was an application for a *certiorari* to remove a conviction for a third offence against the second part of the Canada Temperance Act with a view of quashing the same. The facts on which the application was based were that on an information laid the police magistrate issued a summons, which was served on the defendant, and on the day of trial, the defendant not appearing in person or by counsel, took evidence of the due service of the summons and also some evidence of the violation of the Act complained of, when the prosecutor asked for an adjournment and applied for a warrant to arrest the defendant and bring him before the Court. The Magistrate granted the adjournment and issued his warrant, upon which the defendant was arrested, brought before the Court, tried, and convicted. It was contended that the magistrate had no jurisdiction to issue a warrant for the arrest of the defendant after the trial had been begun *ex parte*.

Held, that the magistrate had acted within his jurisdiction and that the conviction was good.

M. Monagh, for the applicant.

W. C. H. Gummer, contra.

SMITH v. KENNEY.

Justice of the peace—Review by Judge at Chambers—Appeal.

The decision of a Judge at Chambers on a review from a justice's Court is final and no appeal lies therefrom.

Ex parte ZEBLEY.

Assessment and taxes—Certiorari to quash assessment—33 V. c. 46, s. 2—Exemption of railway companies—Street railway company.

This was an application for a certiorari to quash an assessment made by the city of St. John against a street railway company operating lines in that city. The only question to be determined was whether the roadway, rolling stock, stables, and horses of the

Street Railway Company of St. John, incorporated under 30 V. c. 35, was exempted from taxation by virtue of the second section of 33 V. c. 46, the words of which are as follows :—" The exemption provided for by this Act shall extend to the roadway, rolling stock, station houses and grounds, and other property used in running of trains of all railway companies in this Province."

The first section exempts from taxation all the real and personal property belonging to the Eastern and North American Railway Company for extension from St. John westward.

Held, that there is no reason why a railway operated by steam should be exempted and one operated by horse power should not. The word " railway " simply means a way by means of rails, and is as applicable to one as the other, and clearly includes both. It would be doing violence to language to say that the legislature did not intend to include both. The *certiorari* was granted.

Pugsley, S.-G., for the appellant.

I. A. Jack, contra.

BURKE v. CONNIER.

Indian reserves—Title in Provincial Government.

The title to the Indian reserves in the Province of New Brunswick is in the Provincial and not the Dominion Government.

GLOVER v. FERGUSON.

Arrest—Affidavit to hold to bail—" Forborne at interest "—Affidavit, why defective—Costs.

An application was made to set aside the arrest in this case and to discharge the defendant out of custody, on the ground of the insufficiency of the affidavit to hold to bail. The affidavit stated that the defendant was indebted to the plaintiff in the sum of $425.20, for balance due for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for money payable by the defendant to the plaintiff for interest upon money due from the said defendant to the plaintiff, " and forborne at interest by this deponent (plaintiff) to the said John W. Ferguson (defendant), at his request." The objection to the affidavit was that it did

not shew that there was any agreement by the defendant to pay interest. The plaintiff's attorney relied upon the form given in Tidd's Forms, 78.

ALLEN, C.J.—This objection must prevail unless the words "forborne at interest," &c., are a sufficient statement of an agreement to pay interest. The doubt I have had in this case is whether the affidavit of the plaintiff does not shew that there was an agreement to pay interest. The plaintiff's attorney contended that the affidavit stated an implied contract at least to pay interest in the words "forborne at his request." The cases of *Drake* v. *Harding*, 4 Dowl. 34, and *Neale* v. *Shoulton*, 9 Jur. 1058; 2 C. B. 320, shew that the words "at his request" do not sufficiently state a contract to pay interest, but I have had some doubt whether the words "forborne at his request" do not state a contract—whether they do not mean that if the plaintiff at the defendant's request forbore to enforce payment of the money due him, this defendant did not agree to pay him interest upon it.

However, I think this would be rather a matter of inference. It certainly is not an express statement of such an agreement, nor is it certain and explicit, as, according to the authorities, it ought to be. I have therefore come to the conclusion that the affidavit is insufficient. The fact that interest may be recovered under a common indebitatus count (Bull. & Leake Pl. 51) does not bear on the present question. Whether there was an agreement to pay interest or not, is a matter of proof on the trial, but that has nothing to do with the requisites of an affidavit to arrest the defendant for interest, the affidavit to arrest not being traversable.

I am therefore of opinion that the arrest in this case must be set aside and the defendant discharged out of custody on his filing a common appearance in this suit and serving a copy thereof on the plaintiff's attorney; the plaintiff to have leave to amend the *capias* if necessary.

As to the costs of this application, I have had some doubt whether I ought to give them, as the plaintiff's attorney may have been misled by the form in Tidd; but as the arrest in my opinion was illegal, and the defendant had to incur costs to obtain his release from custody, I think I should not be justified in refusing him costs.

On appeal this judgment was sustained by the full Court.

COPP v. GLASGOW AND LONDON INSURANCE CO.

Insurance—Fire—Condition in policy—Meaning of "by any means whatever"—Pleading—Demurrer.

The plaintiff insured a saw mill with the defendants. One of the conditions of the policy was that if without permission of the company the risk became increased or changed "by any means whatever," the policy should be void. The defendants pleaded that after the making of the policy and before the loss, the risk was materially increased and changed without their permission, by the placing of a portable steam saw mill within 99 feet of the plaintiff's mill.

Held, on demurrer, that the plea was bad in not stating that the risk was increased by any act of the plaintiff or of any person under his direction or control.

W. B. Chandler, for the plaintiff.

L. A. Currey, for the defendants.

BANK OF NOVA SCOTIA v. McKENZIE.

Bankruptcy and insolvency—Trust deed and fraudulent bill of sale—Form of decree setting aside—Payment into Court—Ratable distribution among creditors.

This was a suit to set aside a bill of sale made by one Weldon in favour of McKenzie, and so much of a trust deed made by Weldon to McKenzie and Jones as recognized the bill of sale and directed the payment to McKenzie of the amount secured by the bill of sale, on the ground that it was fraudulent and void against the creditors of Weldon. The Judge in Equity declared the bill of sale to be fraudulent and void and directed the defendants McKenzie and Jones to pay the plaintiffs the full amount due them by Weldon out of the moneys in their hands under the trust deed.

On appeal to the full Court the decree was varied by directing the defendants to pay into Court the amount in their hands received under the trust deed, and that such proceeds should be distributed ratably among all the creditors of Weldon, including such as had received a dividend under the trust deed on their releasing Weldon.

D. L. Hanington, Q.C., for the plaintiffs.

F. E. Barker, Q.C., and *W. W. Wells*, for the defendants.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 30TH OCTOBER, 1890.

MACDONALD v. CHRISTIE.

Injunction—Substitutional service on defendant's agent—Notice of motion—Waiver of objections—Certificate of state of cause.

An *ex parte* injunction was granted to the plaintiffs with leave to move to continue it until the hearing. On an allegation that the defendant resided abroad, and that S. was his agent in this Province, the order contained a clause that the plaintiffs should be at liberty to serve the defendant with an office copy of the bill, and a notice of motion to continue the injunction, by serving S., and that such service of an office copy of the bill, properly indorsed, should be deemed personal service on the defendant. The notice of motion served was, "that by leave, &c., a motion will be made on behalf of the plaintiffs, on &c., for an order continuing the injunction this day granted, or that an injunction may be issued in accordance with the prayer of the plaintiffs' bill until the hearing."

No certificate of the state of the cause was filed on obtaining the *ex parte* injunction.

Held, that the defendant could not take objection to the absence of a certificate of the state of the cause; that the notice served was one that could be served under the order giving leave to effect substitutional service, being a notice of motion to continue the injunction already granted; and that the fact that it asked something more should not vitiate it.

Service of a demand, on behalf of the defendant, for copies of affidavits filed by the plaintiffs, was a waiver of any objection to the mode of service on the defendant.

Ewart, Q.C., and *Nugent*, for the plaintiffs.

Culver, Q.C., and *Daly*, Q.C., for the defendant.

[10TH NOVEMBER, 1890.

LEGGO v. THIBAUDEAU.

Parties—Mortgage suit—Incumbrancer prior to mortgage made party by error—Proceedings after abortive sale.

Bill filed in 1882 upon a mortgage. Usual præcipe decree issued, with reference to the Master, and directing a sale on default. The Master settled the priorities of claimants as follows:—Mary Herchmer, upon a judgment, first; the plaintiff, in respect of his mortgage, second; and Lyon & Co., upon a judgment, third. In 1890 the suit was revived, and a final order for sale made. The sale proved abortive. The plaintiff then applied for an order that the accounts might be continued, the amount due to the plaintiff certified, and, in default of payment, foreclosure.

Mary Herchmer, relying on her claim being proved in this suit, did not enforce her execution, and it lapsed.

Ordered, on appeal from the referee, that the accounts be continued, a time limited for payment by the defendants subsequent to the plaintiff of the amount due him, and on default foreclosure, reserving liberty to the defendant Herchmer to apply.

Held, that the defendant Herchmer should never have been made a party defendant, as her claim was prior to that of the plaintiff.

If the plaintiff should pay her off there would be no need to apply, if he should not, then she could ask for a sale, or that the plaintiff pay her or stand foreclosed.

Costs of Herchmer of application before referee and of appeal to be added to her claim.

Cameron, for the plaintiff.

Perdue, for the defendant Herchmer.

[15TH NOVEMBER, 1890.

BROWN v. SHANTZ.

Security for costs—Return of plaintiff within jurisdiction—Motion to discharge order.

An order was made requiring the plaintiff to give security for costs on the ground of his absence from the jurisdiction. The plaintiff gave security. He subsequently moved to discharge the order on an affidavit that he had returned to reside permanently in the Province.

Held, that where the Court is satisfied that the plaintiff has become permanently resident within the jurisdiction, after an order for security has been made, it may be discharged, but it will not be so if the security has been given under it. Motion refused with costs.

Dodge, for the plaintiff.

Hough, for the defendant.

[21ST NOVEMBER, 1890.

REGINA v. STARKEY.

Liquor License Act—Conviction quashed—Jurisdiction of justices.

The defendant was convicted and fined for selling liquor without a license. S. 106 of The Liquor License Act, 52 V. c. 15, provides that "such prosecution may be brought before any police magistrate or before any two justices of the peace." The information was laid before G., a justice of the peace. The summons was signed by him only, and stated the complaint to have been made "before the undersigned, one of Her Majesty's justices of the peace, etc." The complaint was heard and conviction made by G. and F., two justices of the peace.

On motion to quash the conviction :—

Held, that the information being laid before one justice only, the two justices who heard and determined the case had no jurisdiction, and the conviction must be quashed without costs.

Cassidy, for the defendant.

Mulock, Q.C., and *Maclean*, for the justices.

[KILLAM, J., 18TH NOVEMBER, 1890.

DOUGAL v. LEGGO.

Prohibition—County court—Abandonment of excess—Costs on rule nisi.

The plaintiff sued in the County Court to recover $250 ; on the trial he proved that the debt amounted to $578. The defendant objected to the jurisdiction of the Court, as the claim exceeded the amount allowed in the County Court Act, 50 V. c. 9, s. 45. The County Court Judge then allowed the plaintiff to amend by abandoning the excess over $250, and gave judgment for that amount.

On application for prohibition,

Held, that, so far as jurisdiction was concerned, the action could not be entertained without abandonment of excess being

made in the first instance, and that there was no power of amendment where this was not done.

The rule nisi did not ask for costs. No one appeared for the the plaintiff.

Held, that where a rule nisi does not ask for costs, costs are not given unless cause be shown to the rule.

Ashbaugh, for the defendant.

[BAIN, J., 3RD NOVEMBER, 1890.

ARCHIBALD v. MUNICIPALITY OF YOUVILLE.

Tax sale—Bill to set aside—Demurrer allowed—Proceedings illegal—Deed null and void—Illegal sale not a cloud on title.

Bill to set aside a sale of lands for taxes. The plaintiffs alleged they bought the lands in 1888 and received a certificate from the treasurer of the defendants that there were then no taxes in arrear. In 1890 the defendants sold the lands for taxes claimed to be due in 1883 and the following years.

The bill prayed that the sale might be declared null and void, and the defendants restrained from conveying lands to the purchaser.

The defendants demurred on the ground that, the sale having once been made, they had nothing further to do with the matter, and that if, as the bill alleged, the sale was wholly null and void, the Court would not interfere.

Held, that upon the facts set out in the bill, the sale of the lands by the defendants was illegal, and a deed in pursuance of the sale, were one issued, would be null and void. If such a deed were executed, but not registered, the Court would not, under ordinary circumstances, interfere to set it aside. Even if it were registered it might be questionable if the Court would interfere.

The plaintiffs alleged in their bill that the lands were not in fact assessed at all, and that no by-law appointing an assessor or striking a rate of taxation was passed by the defendants in either or any of the years for which taxes were charged.

Held, that the proceedings were not valid on their face, and so the illegal sale could not be considered to be a cloud upon the title, in the sense in which the term is used in the authorities.

Howell, Q.C., for the plaintiffs.

Phippen, for the defendants.

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NOTE:—Where a page only is mentioned, the reference is to the CANADIAN LAW TIMES Occasional Notes for 1890.

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Occ. N.—*Canadian Law Times Occasional Notes.*
S. C. R.—*Supreme Court (of Canada) Reports.*
A. R.—*Ontario Appeal Reports.*
O. R.—*Ontario Reports.*
P. R.—*Ontario Practice Reports.*
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